

No. 11934

United States
Circuit Court of Appeals
for the Ninth Circuit

WARREN H. HAGER,

Appellant,

vs.

CLYDE E. GORDON,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Territory of Alaska, Fourth Judicial Division

JUL 31 1948

PAUL R. O'BRIEN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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JULIEN A. HURLEY

Fairbanks, Alaska

Attorney for Defendant and Appellee

WARREN A. TAYLOR

Fairbanks, Alaska [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 5628

WARREN L. HAGER,

Plaintiff

vs.

CLYDE E. GORDON,

Defendant

SECOND AMENDED COMPLAINT

Comes now the above named plaintiff, and for his causes of action against the above named defendant, alleges and states:

FIRST CAUSE OF ACTION

I.

That the plaintiff is now and at all times herein mentioned has been the owner of and entitled to the possession of the hereinafter described property, which is now located in the Fairbanks Recording District, Fourth Judicial Division of the Territory of Alaska, and is particularly described as follows, to-wit:

One certain power boat with stern wheel named the "Elaine G" and one certain power driven barge used in connection with the "Elaine G" in the handling of freight and cargo on the Tanana, Yukon and Chena Rivers in Alaska; said property being now in the

Chena River near Fairbanks, Alaska, of the reasonable market value of \$25,000.00.

II.

That on or about the 20th day of April, 1946, the above plaintiff was in possession of the above described property, and the defendant took possession of the same unjustly, unlawfully and capriciously, and is now, and has been since said date, unjustly, unlawfully and forceably holding possession thereof, and is wrongfully withholding from this plaintiff all of said personal property above described. [1]

SECOND CAUSE OF ACTION

Plaintiff further alleges for this his second cause of action, as follows:

II.

Plaintiff further alleges for this his second adopts in this cause of action as if fully set out herein, all of the allegations of his First Cause of Action, and in addition thereto alleges:

III.

That the above enumerated and described personal property is properly fitted for handling, hauling and transferring large amounts of freight and cargo on the rivers and waters of Alaska, and on and after the 20th day of April, 1946, the above named defendant has used said boat and property arbitrarily and against the will of this plaintiff and during the months of May, June, July, August,

September and October, hauled many tons of freight on the Chena, Tanana and Yukon rivers, and that the reasonable value of the use of said equipment was Ten Thousand (\$10,000.00) Dollars, and that the use was brought about by the defendant wrongfully taking possession thereof, and holding the same adversely to this plaintiff, and thereby deprived this plaintiff of the use thereof to his damage in the sum of Ten Thousand (\$10,000.00) Dollars.

Wherefore, plaintiff prays judgment on his first cause of action as follows, to-wit:

1. For a judgment requiring the defendant to return and restore to the plaintiff all of the above described personal property, and in the event said personal property cannot be restored, then for a judgment against the defendant for a reasonable market value thereof in a sum of Twenty-five Thousand (\$25,000.00) Dollars, together with interest thereon at the rate of six (6%) per cent from the 20th day of April, 1946.

2. For the further judgment of the Court on plaintiff's second cause of action for the sum of Ten Thousand (\$10,000.00) Dollars, damages, [2]

3. For all costs of this action including a reasonable sum as attorney's fees for plaintiff's attorneys, and for such other and further relief as the Court deems just in the premises.

BAILEY E. BELL and
JULIEN A. HURLEY
Attorneys for Plaintiffs.

United States of America
Territory of Alaska—ss.

Warren L. Hager, being first duly sworn on oath, deposes and says: That he is the plaintiff above named; that he has read the above Second Amended Complaint and knows the contents thereof, and that the same is true and correct as he verily believes.

[Seal] /s/ WARREN L. HAGER

Subscribed and sworn to before me this 1st day of October, 1947.

/s/ BAILEY E. BELL,

Notary Public in and for the
Territory of Alaska.

My commission expires: 1/28/49

Service of a copy of the above is hereby acknowledged this 1st day of October, 1947.

LATHANAN & TAYLOR

J. A. Lathanan, Jr.

[Endorsed]: Filed Oct. 1, 1947 [3]

[Title of District Court and Cause]

ANSWER

Comes now the defendant above-named and for his answer to the Second Amended Complaint of the Plaintiff now on file herein, admits, denies and alleges as follows:

I.

Defendant denies each and every allegation contained in paragraphs I and II of the First Cause of Action stated in Plaintiff's Second Amended Complaint, and the whole thereof, save and except that the Defendant admits that he has had possession of the property described in said Cause of Action at all times mentioned in said Cause of Action, and that said boat and barge are located in the Fairbanks Recording Precinct, Fourth Division, Territory of Alaska; and Defendant affirmatively alleges that he has had such possession at all times since said boat and barge were built.

II.

For answer to paragraph III of Plaintiff's in Plaintiff's Second Amended Complaint, Defendant denies each and every allegation contained in paragraph II thereof and the whole of said paragraph.

III.

For an answer to paragraph III of Plaintiff's Second Cause of Action, Defendant admits that the

said boat and barge are fitted for hauling freight and cargo on the rivers and waters of Alaska during the open season of navigation and Defendant denies each and every other allegation in said paragraph contained. [4]

As a further defense and by way of his First Affirmative Defense to the First and Second Causes of Action stated in Plaintiff's Second Amended Complaint, Defendant alleges as follows:

I.

That the Defendant, at all times mentioned in Plaintiff's Amended Complaint, was and now is the owner in possession of and entitled to the possession of the power boat and barge described in Plaintiff's Second Amended Complaint, and that said ownership and right of possession is exclusive and absolute.

Wherefore, having fully answered the Second Amended Complaint of the Plaintiff now on file herein, the Defendant prays that the same be dismissed and the Plaintiff take nothing thereby; and that the Defendant have and recover from the Plaintiff his costs and disbursements incurred herein including a reasonable sum as attorney's fees and for such other and further relief as the Court deems just in the premises.

LATHANAN & TAYLOR

/s/ By J. A. Lathanan, Jr.

United States of America
Territory of Alaska—ss.

Clyde E. Gordon, being first duly sworn, on oath deposes and says: That he is the defendant above-named; that he has read the above Answer and knows the contents thereof, and that the same is true and correct as he verily believes.

[Seal] /s/ CLYDE E. GORDON

Subscribed and sworn to before me this 20th day of October, 1947.

/s/ J. A. LATHANAN, JR.

Notary Public for Alaska

My Commission expires May 20, 1951.

Service acknowledged by receipt of copy of the foregoing Answer this 20th day of October, 1947.

BAILEY E. BELL

By F. W. Dillard

[Endorsed]: Filed Oct. 21, 1947. [5]

[Title of District Court and Cause]

REPLY

Comes now the above named plaintiff and for reply to the answer filed herein denies and admits as follows, to-wit:

I.

Plaintiff denies all affirmative matter set forth

in paragraph number I., and the whole thereof, and specifically denies that the defendant has had possession of said boat and barge at all times since it was built.

II.

Plaintiff denies the allegations in paragraph marked I., on page two of the answer, and the whole thereof, and specifically denies that the defendant is the owner of and entitled to the possession of the boat and barge described in plaintiff's complaint, and denies that the defendant owns any part thereof, and denies that the defendant is entitled to the possession thereof.

Wherefore, plaintiff having fully replied to defendant's answer prays that he may recover as in his complaint asked for and for such other and further relief as he is, by law entitled to.

/s/ BAILEY E. BELL

/s/ JULIEN A. HURLEY

Attorneys for Plaintiff. [6]

United States of America,
Territory of Alaska—ss.

Warren L. Hager, being first duly sworn, on oath says; That he is the Plaintiff above named; that he has read the above reply and knows the contents thereof, and that the same is true and correct as he verily believes.

[Seal]

/s/ WARREN L. HAGER

Subscribed and sworn to before me this 29th day of December, 1947.

/s/ BAILEY E. BELL

Notary Public, Territory of Alaska

My Commission expires 1-28-49.

Service acknowledged by receipt of a copy of the foregoing reply this 29th day of December, 1947.

/s/ WARREN A. TAYLOR

Attorney for Defendant.

[Endorsed]: Filed Dec. 29, 1947. [7]

[Title of District Court and Cause]

INSTRUCTIONS

Members of the Jury: You are instructed:

I.

A.

That the Plaintiff, Hager, makes the following claims, to-wit: That in the latter part of 1944 he and the Defendant, Gordon, entered into an oral agreement as follows, to-wit:

(1) The Defendant, Gordon, should furnish the money to build, equip and operate a stern wheel power boat (afterwards named "Elaine G"), and a power driven barge (afterwards named "Elaine G");

(2) That the Plaintiff, Hager, would operate said boat and barge and apply the earnings thereof

to the payment of the cost of building, equipping and operating said boat and barge;

(3) That when the earnings of said boat and barge paid off the cost of building, equipping and operating said boat and barge, the same would be the property of the Plaintiff, Hager, free of all liabilities;

(4) That at all times before such earnings of said boat and barge paid off the cost of building, equipping and operating the same, the Plaintiff, Hager, was to be the owner of said boat and barge;

(5) That before the 20th day of April, 1946, the earnings of said boat and barge had paid off all of the cost of building, equipping and operating said boat and barge.

B.

You are instructed that if the Plaintiff, Hager, has proved, by a preponderance of the evidence in this case, each of the matters set forth in sub-paragraphs (3), (4) and (5) of Paragraph A of this Instruction, then, and only then, should you find in favor of the Plaintiff and sign Verdict Number I. If the Plaintiff fails to prove the matters set forth in any of said sub-paragraphs (3), (4) and (5) above, by a preponderance of the evidence in this case, or if the evidence in this case as to the matters set forth in said sub-paragraphs (3), (4) and (5) is equally divided, you should find against the Plaintiff on the issues set forth

in this case, and you should find for the Defendant, Gordon, and sign Verdict Number II.

II.

The Defendant, Gordon, claims that his agreement with the Plaintiff Hager, in the latter part of 1944 was as follows, to-wit:

(a) That he, Gordon, was to build the boat and barge afterwards known as "Elaine G";

(b) That said Hager would operate said boat and barge, "Elaine G", and apply the earnings thereof to the repayment of the cost of building, equipping and operating said boat and barge;

(c) That when the earnings from said boat and barge paid off the cost of building, equipping and operating said boat and barge he, Gordon, would give him, Hager, a title to said boat and barge; [9]

(d) That the earnings from said "Elaine G" boat and barge had not, on or before the 20th day of April, 1946, paid off the cost of building, equipping and operating said boat and barge;

(e) That he, Gordon, never executed any title transferring said "Elaine G" boat and barge to said Hager, or anyone else.

You are instructed that you should consider the above claims of the Defendant, Gordon, at the same time that you consider the claims of the Plaintiff, Hager, mentioned in Instruction Number I, and give effect to such claims as you believe to be true.

III.

(a) You are instructed that this is an action in claim and delivery, which can be maintained by the Plaintiff, Hager, only in case he was the owner of the "Elaine G" boat and barge upon the 20th day of April, 1946, and thereafter. If the owner of said boat and barge, upon the 20th day of April, 1946, was the Defendant, Gordon, then the Plaintiff cannot prevail in this action, and this is true without regard to whether or not the earnings of said "Elaine G" boat and barge had paid off the cost of building, equipping and operating said boat and barge.

(b) You are further instructed that unless the Plaintiff, Hager, proves by a preponderance of the evidence in this case that he, Hager, and not the Defendant, Gordon, was the owner of said "Elaine G" boat and barge upon the 20th day of April, 1946, [10] you should find against the Plaintiff, Hager, and in favor of the defendant, Gordon.

(c) You are instructed that if you believe from the evidence Defendant, Gordon, furnished all the money for the building, equipping and operating (except salary for Plaintiff, Hager) of the boat and barge "Elaine G" prior to April 20, 1946, the title and ownership of said boat and barge would have been in him, Gordon, unless the Plaintiff has proved by a preponderance of the evidence in this case that he and the Defendant agreed, as men-

tioned in sub-paragraph (4) of Paragraph A of Instruction Number I, to-wit: That at all times before the earnings of said "Elaine G" boat and barge paid off the cost of building, equipping and operating said boat and barge, the said Hager was to be the owner of said boat and barge.

IV.

You are instructed that if you find in favor of the Plaintiff, Hager, as to the ownership of said boat and barge on April 20, 1946 and thereafter, and as to the earnings of said boat and barge having paid off the cost of building, equipping and operating the same, then it would be your duty to find that the Plaintiff, Hager, was damaged in the sum of \$10,000 by the taking and withholding of said boat and barge by the Defendant, Gordon, and you should further find in your Verdict that the value of said boat and barge, at the time of said taking, was the sum of \$55,000. These matters are set forth in Verdict Number I. [11]

Except where the court declares the evidence to be conclusive, you, members of the jury, are the judges of the value of all of the evidence admitted in the case. However, your power of judging the effect of evidence is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of evidence as administered by and given to you by the court in its instructions.

You should not permit the remarks or expressions of opinion by the attorneys in the case to influence your judgment unless the same are in

conformity with the evidence or are logical deductions therefrom.

Your duty is to determine the facts of the case from the evidence submitted in conformity with the instructions of the court.

It is the duty of the judge of this court to instruct you as to the law involved in this case and it is your duty, as jurors, to accept as law and to follow the same, whatever is laid down to you as the law of the case by the judge of this court. [12]

You are instructed that the laws of the Territory of Alaska lay down the following general rules for your guidance as to the value of evidence, to-wit:

1. That your power of judging the effect of evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence.
2. That you are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying to your minds.
3. That a witness wilfully false in one part of his testimony may be distrusted in others.
4. That when the evidence is contradictory, the findings shall be in accordance with the preponderance of the evidence.
5. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to

produce and of the other to contradict; and, therefore,

6. That if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

7. That oral admissions of a party should be viewed with caution. [13]

You are instructed as follows:

1. That by "preponderance of evidence" is meant the amount of evidence which taken on the whole produces the stronger impression upon the minds of the jury and convinces them of its truth when weighed against the evidence in opposition thereto;

2. That you should not consider any evidence sought to be introduced, but excluded by the court, nor should you consider any evidence that has been stricken from the record by the court;

3. That it is manifestly impossible for the court to cover the law of this case in a few instructions, and that, therefore, you should consider all the instructions together and not disconnectedly;

4. That you should endeavor to agree upon a verdict and should calmly reason with your fellows with the view of arriving at a verdict. You should not refuse to agree from pride of opinion, nor should you surrender any conscientious views

founded on the evidence or lack of evidence. [14]

Pursuant to the foregoing Instructions, I have prepared two forms of verdict, which are self-explanatory, for you to take into your jury room. You should elect a foreman and by him sign the verdict upon which you unanimously agree, and return it into the court as your verdict.

Herewith I hand you these Instructions for your guidance, together with the above-mentioned forms of verdict, the exhibits that have been introduced in evidence, and the pleadings in the case. Return all of these into Court with your verdict.

Dated at Fairbanks, Alaska, this 28th day of January, 1948.

HARRY E. PRATT

District Judge.

[Endorsed]: Filed Jan. 28, 1948. [15]

[Title of District Court and Cause]

VERDICT NUMBER I

We, the jury, duly empaneled and sworn to try the above-entitled case, do, from the evidence and the law of the case, find in favor of the Plaintiff, Hager, and against the Defendant, Gordon, and that the Plaintiff, Hager, was, upon the 20th day of April, 1946, and at all times thereafter, the owner of and entitled to the possession of that certain stern wheel power boat named "Elaine G",

and that certain power driven barge named "Elaine G";

We further find that the value of said boat and barge, upon the 20th day of April, 1946, was the sum of \$55,000.00, and that the Plaintiff has suffered damages in the sum of \$10,000.00 by the taking and withholding of said boat and barge by the Defendant.

Done at Fairbanks, Alaska, this.....day of January, 1948.

.....

Foreman. [16]

[Title of District Court and Cause]

VERDICT NUMBER II.

We, the Jury, duly empaneled and sworn to try the above-entitled cause, do, from the evidence and the law of the case, find in favor of the Defendant, Gordon, and against the Plaintiff, Hager, and that upon the 20th day of April, 1946, and thereafter, the Defendant, Gordon, was the owner of and entitled to the possession of that certain stern wheel boat named "Elaine G", and that certain power driven barge named "Elaine G".

Done at Fairbanks, Alaska, this 28th day of January, 1948.

DONALD McDONALD III

Foreman.

Jan. 28, 1948.

Entered in Court Journal No. 36, Page 121.

[Endorsed]: Filed Jan. 28, 1948. [17)

[Title of District Court and Cause]

MOTION FOR NEW TRIAL

Comes now Warren L. Hager, and moves the court to set aside the verdict of the Jury in the above-entitled cause, and to grant a new trial, and for grounds states:

I.

That the Court erred in sustaining the defendants' objections to competent questions, thereby preventing the introduction of competent evidence.

II.

That the Court erred in excluding competent, material and relevant evidence throughout the entire proceedings.

III.

That the court erred in sustaining the numerous objections to the plaintiff's questions, which if answered, would have caused competent evidence to have been admitted on the part of the plaintiff.

IV.

The Court erred in admitting incompetent evidence on the part of the defendant.

V.

That the court erred in giving the following instructions to the Jury, which were excepted to by

the plaintiff and exceptions were allowed by the Court.

(IV) That at all times before such earnings of said boat and barge paid off the cost of building, equipping and operating the same, the Plaintiff, Hager, was to be the owner of said boat and barge. [18]

(II) The Defendant, Gordon, claims that his agreement with the Plaintiff, Hager, in the latter part of 1944 was as follows, to-wit:

(a) That he, Gordon, was to build the boat and barge afterwards known as "Elaine G";

(b) That said Hager would operate said boat and barge, "Elaine G", and apply the earnings thereof to the repayment of the cost of building, equipping and operating said boat and barge;

(c) That when the earnings from said boat and barge paid off the cost of building, equipping and operating said boat and barge he, Gordon, would give him, Hager, a title to said boat and barge;

(d) That the earnings from said "Elaine G" boat and barge had not, on or before the 20th day of April, 1946, paid off the cost of building, equipping and operating said boat and barge;

(e) That he, Gordon, never executed any title transferring said "Elaine G" boat and barge to said Hager, or anyone else.

You are instructed that you should consider the above claims of the Defendant, Gordon, at the same

time that you consider the claims of the Plaintiff, Hager, mentioned in instruction Number I, and give effect to such claims as you believe to be true.

(III) (a) You are instructed that this is an action in claim and delivery, which can be maintained by the Plaintiff, Hager, only in case he was the owner of the "Elaine G" boat and barge upon the 20th day of April, 1946, and thereafter. If the owner of said boat and barge, upon the 20th day of April, 1946, was the Defendant, Gordon, then the Plaintiff cannot prevail in this action, and this is true without regard to whether or not the earnings of said "Elaine G" boat and barge had paid off the cost of building, equipping and operating said boat and barge.

(b) You are further instructed that unless the Plaintiff, Hager, proves by a preponderance of the evidence in this case that he, Hager, and not the Defendant, Gordon, was the owner of said "Elaine G" boat and barge upon the 20th day of April, 1946, you should find against the Plaintiff, Hager, and in favor of the defendant, Gordon.

(c) You are instructed that if you believe from the evidence Defendant, Gordon, furnished all the money for the building, equipping and [19] operating (except salary for Plaintiff, Hager) of the boat and barge "Elaine G" prior to April 20, 1946, the title and ownership of said boat and barge would have been in him, Gordon, unless the Plaintiff has proved by a preponderance of the evidence

in this case that he and the Defendant agreed, as mentioned in sub-paragraph (4) of Paragraph A of Instruction Number I, to-wit: That at all times before the earnings of said "Elaine G" boat and barge paid off the cost of building, equipping and operating said boat and barge, the said Hager was to be the owner of said boat and barge.

VI.

That the verdict of the Jury is contrary to the evidence and is contrary to the Law.

VII.

That the verdict is not sustained by any confident evidence; is against the clear weight of the evidence and should be set aside, vacated and a new trial granted.

VIII.

That the verdict as returned into court was arrived at unlawfully, and was arrived at bias, prejudice and misconduct on the part of certain Jurors and was rendered for sympathy for the said Defendant.

IX.

That the Jury in arriving at the verdict took into consideration the income tax matter, which was excluded by the court, which prevented a fair and impartial verdict.

Plaintiff Therefore, prays the Court to grant a new trial in said cause, and to do justice between

the parties regardless of the purported verdict rendered.

JULIEN A. HURLEY and
BAILEY E. BELL

Attorneys for Plaintiff.

Copy of the above motion served this 31st day
of January, 1948.

/s/ WARREN A. TAYLOR,

Attorney for Defendant.

[Endorsed]: Filed Jan. 31, 1948. [20]

[Title of Cause]

ORDER

The Court having on February 6, 1948, heard the arguments of respective counsels in this cause on the Motion for a New Trial and now being fully advised in the premises, it was Ordered that the Motion be Denied.

Feb. 13, 1948.

Entered in Court Journal No. 36, Page 152. [21]

In the District Court for the Territory of Alaska,
Fourth Division

No. 5628

WARREN L. HAGER,

Plaintiff,

vs.

CLYDE E. GORDON,

Defendant.

JUDGMENT

This cause coming on regularly for trial on the 26th day of January, 1948, the Plaintiff appearing in person and by his attorneys, Bailey Bell and Julien A. Hurley, and the defendant appearing in person and by his attorney, Warren A. Taylor, and the jury having been duly empaneled and sworn to try the issues in the above-entitled action and evidence having been submitted on behalf of the plaintiff and defendant and the arguments of counsel having been made for the plaintiff and defendant and the Court having duly instructed the jury as to the law, and the said jury having considered the law and the evidence, duly returned into Court their verdict on the 28th day of January, 1948, in words and figures following, to-wit:

VERDICT NUMBER II.

We, the Jury, duly empaneled and sworn to try the above-entitled cause, do, from the evidence and the law of the case, find in favor of the Defendant,

Gordon, and against the Plaintiff, Hager, and that upon the 20th day of April, 1946, and thereafter, the Defendant, Gordon, was the owner of and entitled to the possession of that certain stern wheel boat named "Elaine G", and that certain power driven barge named "Elaine G".

Done at Fairbanks, Alaska, this 28th day of January, 1948.

/s/ DONALD McDONALD III
Foreman. [22]

Now, therefore, upon motion of the attorney for the defendant and in accordance with the verdict of the jury,

It is hereby ordered, adjudged and decreed that the Plaintiff take nothing by said action and that the Defendant have and recover his costs herein expended together with the sum of \$5000.00 as attorney's fees.

Dated at Fairbanks, Alaska, this 22nd day of March, 1948.

HARRY E. PRATT
District Judge.

Service of copy of acknowledged this.....day of Feb., 1948.

BAILEY E. BELL
Atty. for Plaintiff.

Lodged Feb. 18, 1948.

Entered in Court Journal No. 36, Page 164-165.

[Endorsed]: Filed Mar. 22, 1948. [23]

[Title of District Court and Cause]

NOTICE OF APPEAL

The name and address of Appellant is: Warren L. Hager, of Fairbanks, Alaska.

Name and address of Appellant's Attorneys' are: Julien A. Hurley and Bailey E. Bell of Fairbanks, Alaska.

Name and address of Appellee is: Clide E. Gordon, Fairbanks, Alaska.

Name and address of the Attorney of record for Appellee is: Warren A. Taylor, of Fairbanks, Alaska.

The action is one for the recovery of personal property and for damage for the wrongful withholding thereof.

The action is based upon and filed under and by virtue of the Laws of the Territory of Alaska, and attention is called to Chapter LXXX of the Compiled Laws of Alaska, 1933.

That at the close of all of the evidence the Court instructed the Jury, and it is our contention, erred therein, which errors prevented this plaintiff from having a fair trial.

That the jury rendered an unconscionable verdict, which was contrary to all of the evidence, and not supported by any competent evidence, and contrary to the great weight of the evidence.

That thereafter, and within three days, the plaintiff filed his motion for a new trial in said

cause; which is hereby made a part of this notice by reference as fully as if set out herein. [24]

That thereafter, and on the 12th day of February, 1948, the Honorable Harry E. Pratt, Judge of the above-entitled Court erroneously overruled said motion and denied the plaintiff any recovery; which was error on the part of the Court.

I, Warren L. Hager, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment above-mentioned on the grounds set forth below:

I.

The Court erred in overruling plaintiff's Motion for a new trial.

II.

The Court erred in sustaining the defendant's objections to competent questions, thereby preventing the introduction of competent evidence.

III.

The Court erred in refusing the offers of the plaintiff to provide competent, material and relevant facts.

IV.

The Court erred in admitting incompetent evidence on the part of the defendant.

V.

The Court erred in giving instruction to the Jury which prevented the plaintiff from having a fair trial.

VI.

The Court erred in refusing to give the offered instructions.

VII.

The verdict, as returned into court, was arrived at unlawfully and was based on prejudice and misconduct on the part of certain jurors.

VIII.

That the Jury in arriving at its verdict, considered the income tax matter as advanced and argued by defendant's attorney; which prevented a fair and impartial verdict.

IX.

Errors of law occurring at the trial on the part of the Court. Error of the Court in not instructing the Jury to render a verdict for the plaintiff. [25] Error of the court in not taking the case from the Jury and rendering judgment for the plaintiff on motion and request of plaintiff at the close of all the evidence.

Respectfully submitted,

WARREN L. HAGER
Plaintiff.

BAILEY E. BELL and
JULIEN A. HURLEY
Attorneys for Plaintiff.

Service of a copy of the above is hereby acknowledged this 2nd day of February, 1948.

/s/ WARREN A. TAYLOR

Attorney for Defendant.

[Endorsed]: Filed Mar. 2, 1948. [26]

[Title of District Court and Cause]

MOTION FOR A NEW TRIAL

Comes now the above-named plaintiff, Warren L. Hager, and moves the Court to grant a new trial in the above-entitled cause, and for grounds of this motion, states:

I.

That by the rules of the judge of this Court it is necessary to file a motion for a new trial within five (5) days from the return and filing of a verdict by a jury.

On January 28, 1948 a verdict was rendered in the above-entitled cause; on January 31, 1948 a motion for a new trial was filed by the plaintiff, which was argued on February 6, 1948; denied February 13, 1948 and then the Judge of this Court went to the Continental United States and did not return to the bench until March 22, 1948; on March 22, 1948 the judge of this court rendered his judgment in this case in favor of the defendant, and rendered additional judgment of granting the defendant judgment against the plaintiff for

Five Thousand (\$5,000.00) Dollars as an Attorneys fee in said case.

II.

This plaintiff now moves the Court to set aside, vacate and hold for naught the judgment rendered herein on the 22nd, day of March, 1948 in its entirety for all of the reasons heretofore in his motion for a new trial filed in this Court on the 31st day of January, 1948, and hereby makes his motion for a new trial a part of this motion for a new trial as fully as if set out herein in full.

III.

Plaintiff specifically moves the Court to set aside, vacate and hold for naught the judgment rendered on the 22nd day of March, 1948 granting the defendant a judgment for an attorney's fee against [27] the plaintiff in the sum of \$5,000.00, and as grounds therefore, states: that said judgment was not within the power of the court to grant.

That it was granted without any evidence being provided by any person, and without any evidence having been produced to the Court as to the reasonableness of said fee, and the same is excessive, oppressive and unreasonable, and that the Honorable Warren A. Taylor, who is the Attorney for the defendant, was only engaged in one way in the trial of this case, or in the preparation of the pleadings to the extent of Three (3) days.

IV.

For the further reason that the amendment to the Alaska Statutes purporting to authorize the granting of judgment to the prevailing party was not in force and effect at the time this suit was filed and the controversy arose, which caused the litigation.

That the amendment to Chapter 58 of the Session Laws of Alaska, 1937, is void and not having been properly passed and approved as the law required and is unconstitutional and void.

Wherefore, Plaintiff prays the court to grant a new trial, and to set aside each of the judgments herein rendered on the 22nd, day of March, 1948; one of which denied the plaintiff any right of recovery, and the other granted the defendant a judgment for \$5,000.00 for an Attorney's fee against the plaintiff, and for such other and further relief as is just and equitable in the premises.

/s/ J. A. HURLEY

/s/ BAILEY E. BELL

Attorney for Plaintiff. [28]

United States of America,
Fourth Judicial Division,
Territory of Alaska—ss.

Warren L. Hager, being first duly sworn, on oath, deposes and says:

That he is the plaintiff above-named; that he

has read the above and foregoing Motion for a New Trial; knows the contents thereof and that the same is true, as he verily believes.

[Seal] /s/ WARREN L. HAGER

Subscribed and sworn to before me this 24th day of March 1948.

BAILEY E. BELL

Notary Public in and for the Territory of Alaska.

My commission expires: 1/28/49.

Service of a copy of the above is hereby acknowledged this 24th day of March, 1948.

WARREN A. TAYLOR

By Bessie Akers

Attorney for Plaintiff.

[Endorsed]: Filed Mar. 24, 1948. [29]

[Title of Cause]

ORDER

The Plaintiff was represented by Bailey E. Bell; the defendant by Warren A. Taylor.

Respective counsel submitted the Motions for a New Trial without argument.

It was ordered that the Motions be denied.

Mar. 29, 1948.

Entered in Court Journal No. 36, Page 182. [30]

[Title of District Court and Cause]

NOTICE OF APPEAL

The name and address of Appellant is: Warren L. Hager, of Fairbanks, Alaska.

Name and address of Appellant's Attorneys are: Julien A. Hurley and Bailey E. Bell of Fairbanks, Alaska.

Name and address of Appellee is: Clyde E. Gordon, Fairbanks, Alaska.

Name and address of the Attorney of Record for Appellee is: Warren A. Taylor, of Fairbanks, Alaska.

This action is one for the recovery of personal property and for damage for the wrongful withholding thereof.

The action is based upon and filed under and by virtue of the Laws of the Territory of Alaska, and attention is called to Chapter LXXX of the Compiled Laws of Alaska, 1933.

That at the close of all of the evidence the Court instructed the jury, and it is our contention, erred therein, which errors prevented this plaintiff from having a fair trial.

That the jury rendered an unconscionable verdict, which was contrary to all of the evidence, and not supported by any competent evidence, and contrary to the great weight of the evidence.

That thereafter, and within three days, the plaintiff filed his motion for a new trial in said

cause; which is hereby made a part of this notice by reference as fully as if set out herein.

That thereafter, and on the 12th day of February, 1948, the Honorable Harry E. Pratt, Judge of the above-entitled Court erroneously overruled said motion and denied the plaintiff any recovery; which was [31] error on the part of the Court.

That after the overruling of said motion, and within thirty (30) days thereafter, the plaintiff filed his notice of Appeal in this case and before judgment was actually rendered the Judge of this Court left the Territory of Alaska, for a trip to the continental United States and returned to the bench and court on March 22, 1948.

That the Court rendered judgment in this case on March 22, 1948, denying plaintiff any recovery and taxed all costs of said case against plaintiff, which was error, and then erroneously rendered a judgment for the defendant for \$5,000.00 Attorney's fee against the plaintiff without any evidence whatsoever having been introduced or even offered, to base said judgment on, and that said judgment is excessive, unjust, oppressive and beyond the powers of the court to render, and there is no valid Statute of the Territory of Alaska and no laws of the United States of America to authorize such a judgment.

That within five (5) days after the said judgment was rendered and on the 24th day of March, 1948, plaintiff filed his motion for a new trial and

especially directed it to the part of the judgment awarding the defendant an attorney's fee of \$5,000.00; which motion was by the court overruled, and excepted to by the plaintiff and an exception was allowed to the plaintiff by the court.

I, Warren L. Hager, hereby appeal to the United State Circuit Court of Appeals for the Ninth Circuit, from the judgment above-mentioned on the grounds and for the reasons above set forth and as set out below:

I.

The Court erred in overruling plaintiff's Motion for a New Trial.

II.

The Court erred in overruling the motion for a new trial filed on March 24, 1948, which motion was overruled on the 29th day of March, 1948.

III.

The Court erred in sustaining the defendant's objections to competent question,s thereby preventing the introduction of competent evidence. [32]

IV.

The Court erred in refusing the offers of the plaintiff to provide competent, material and relevant facts.

V.

The Court erred in admitting incompetent evidence on the part of the defendant.

VI.

The Court erred in giving instructions to the Jury which prevented the plaintiff from having a fair trial, which instructions were objected to and excepted to by the plaintiff and said exceptions were by the court allowed.

VII.

The Court erred in refusing to give the plaintiff's offered instructions as shown in the record which are made a part of this notice by reference as fully as if set out herein in full.

VIII.

The Court erred in not instructing the jury to return a verdict for the plaintiff for the recovery of the boat and barge at the close of all of the evidence for the reason the plaintiff has fully established his right of possession and the defendant had offered no proof in denial thereof and there was no issue for the jury to determine except the amount if any damages plaintiff was entitled to recover.

IX.

The verdict, as returned into Court, was arrived at unlawfully and was based on prejudice and misconduct on the part of certain jurors, was contrary to the law, was contrary to the facts, was not supported by any competent evidence and was against the clear weight of the evidence.

X.

That the jury in arriving at its verdict, considered the income tax matter as advanced and argued by defendant's attorney; which prevented a fair and impartial verdict when the income tax matter was not a proper issue in this case. [33]

XI.

Errors of law occurring at the trial on the part of the Court.

XII.

Error of the Court in not taking the case from the jury and rendering judgment for the plaintiff on motion and request of plaintiff at the close of all the evidence.

Respectfully submitted,

/s/ WARREN L. HAGER,
Plaintiff.

/s/ JULIEN A. HURLEY and
BAILEY E. BELL,
Attorneys for Plaintiff.

Service of a copy of the above is hereby acknowledged this 9th day of April, 1948.

WARREN A. TAYLOR—MAE
Attorney for Defendant.

[Endorsed]: Filed April 9, 1948. [34]

[Title of District Court and Cause]

ASSIGNMENT OF ERRORS

Comes now above named Plaintiff, Warren L. Hager, and for Assignment of Errors in the above entitled cause alleges and states:

I.

That the Court erred in overruling the Plaintiff's motion for a new trial which motion is in words and figures as follows:

“No. 5628.

MOTION FOR NEW TRIAL

Comes now Warren L. Hager, and moves the court to set aside the verdict of the Jury in the above-entitled cause, and to grant a new trial, and for grounds states:

I.

That the Court erred in sustaining the defendant's objections to competent questions thereby preventing the introduction of competent evidence.

II.

That the Court erred in excluding competent, material and relevant evidence throughout the entire proceedings.

III.

That the Court erred in sustaining the numerous objections to the plaintiff's questions, which if answered, would have caused competent evidence to have been admitted on the part of the plaintiff.

IV.

The Court erred in admitting incompetent evidence on the part of the defendant. [35]

V.

That the Court erred in giving the following instructions to the Jury which were excepted to by the Plaintiff and exceptions were allowed by the Court.

‘(IV) That all times before such earnings of said boat and barge paid off the cost of building, equipping and operating the same, the Plaintiff, Hager, was to be the owner of said boat and barge.’

‘(II) The Defendant, Gordon, claims that his agreement with the Plaintiff, Hager, in the latter part of 1944 was as follows, to-wit:

(a) That he, Gordon, was to build the boat and barge afterwards known as “Elaine G”;

(b) That said Hager would operate said boat and barge, “Elaine G”, and apply the earnings thereof to the repayment of the cost of building, equipping and operating said boat and barge;

(c) That when the earnings from said boat and barge paid off the cost of building, equipping and operating said boat and barge he, Gordon, would give him, Hager, a title to said boat and barge;

(d) That the earnings from said “Elaine G” boat and barge had not, on or before the 20th day of April, 1946, paid off the cost of building, equipping and operating said boat and barge;

(e) That he, Gordon, never executed any title transferring said "Elaine G" boat and barge to said Hager, or anyone else.

You are instructed that you should consider the above claims of the Defendant, Gordon, at the same time that you consider the claims of the Plaintiff, Hager, mentioned in Instruction Number I, and give effect to such claims as you believe to be true.

(III) (a) You are instructed that this is an action in claim and delivery, which can be maintained by the Plaintiff, Hager, only in case he was the owner of the "Elaine G" boat and barge upon the 20th day of April, 1946, and thereafter. If the owner of said boat and barge, upon the 20th day of April, 1946, was the Defendant, Gordon, then the Plaintiff cannot prevail in this action, and this is true without regard to whether or not the earnings of said "Elaine G" boat and barge had paid off the cost of building, equipping and operating said boat and barge.

(b) You are further instructed that unless the Plaintiff, Hager, proves by a preponderance of the evidence in this case that he, Hager, and not the defendant, Gordon, was the owner of said "Elaine G" boat and barge upon the 20th day of April, 1946, you should find against the Plaintiff, Hager, and in favor of the defendant, Gordon.

(c) You are instructed that if you believe from the evidence Defendant, Gordon, furnished all the

money for the building, equipping and operating (except salary for Plaintiff, Hager) of the boat and barge "Elaine G" prior to April 20, 1946, the title and ownership of said boat and barge would have been in him, Gordon, unless the Plaintiff has proved by a preponderance of the evidence in this case that he and the Defendant agreed, as mentioned in sub-paragraph (4) of Paragraph A of Instruction Number I, to-wit: That at all times before the earnings of said "Elaine G" boat and barge paid off the cost of building, equipping and operating said boat and barge, the said Hager was to be the owner of said boat and barge.' [36]

VI.

That the verdict of the Jury is contrary to the evidence and is contrary to the Law.

VII.

That the verdict is not sustained by any competent evidence: is against the clear weight of the evidence and should be set aside, vacated and a new trial granted.

VIII.

That the verdict as returned into court was arrived at unlawfully, and was arrived at by bias, prejudice and misconduct on the part of certain Jurors and was rendered from sympathy for the said Defendant.

IX.

That the Jury in arriving at the verdict took

into consideration the income tax matter, which was excluded by the court, which prevented a fair and impartial verdict.

Plaintiff Therefore, prays the Court to grant a new trial in said cause, and to do justice between the parties regardless of the purported verdict rendered.

JULIEN A. HURLEY,
BAILEY E. BELL,
Attorneys for Plaintiff.”

II.

The Court erred in overruling the Plaintiff's second motion for a new trial filed after the court rendered judgment for \$5,000.00 attorney's fees against the Plaintiff, which motion was overruled on March 29, 1948, “No. 5628.

MOTION FOR A NEW TRIAL

Comes now the above-named plaintiff, Warren L. Hager, and moves the Court to grant a new trial in the above-entitled cause, and for grounds of this motion, states: [37]

I.

That by the rules of the Judge of this Court it is necessary to file a motion for a new trial within five (5) days from the return and filing of a verdict by a jury.

On January 28, 1948, a verdict was rendered in

the above-entitled cause; on January 31, 1948, a motion for a new trial was filed by the plaintiff, which was argued on February 6, 1948; denied February 13, 1948, and then the Judge of this Court went to the Continental United States and did not return to the bench until March 22, 1948; on March 22, 1948, the judge of this court rendered his judgment in this cause in favor of the defendant, and rendered additional judgment granting the defendant judgment against the plaintiff for five thousand (\$5,000.00) dollars as an attorney's fee in said case.

II.

This plaintiff now moves the Court to set aside, vacate and hold for naught the judgment rendered herein on the 22nd day of March, 1948, in its entirety for all of the reasons heretofore in his motion for a new trial filed in this Court on the 31st day of January, 1948, and hereby makes his motion for a new trial a part of this motion for a new trial as fully as if set out herein in full.

III.

Plaintiff specifically moves the Court to set aside, vacate and hold for naught the judgment rendered on the 22nd day of March, 1948, granting the defendant a judgment for an attorney's fee against the plaintiff in the sum of \$5,000.00, and as grounds therefore, states: That said judgment was not within the power of the court to grant.

That it was granted without any evidence being

provided by any person, and without any evidence having been produced to the Court as to the reasonableness of said fee, and the same is excessive, oppressive and unreasonable, and that the Honorable Warren A. Taylor, who is the Attorney for the defendant, was only engaged in one way in the trial of this case or in the preparation of the pleadings to the extent of three (3) days. [38]

IV.

For the further reason that the amendment to the Alaska Statutes purporting to authorize the granting of judgment to the prevailing party was not in force and effect at the time this suit was filed and the controversy arose, which caused the litigation.

That the amendment to Chapter 58 of the Session Laws of Alaska, 1937, is void and not having been properly passed and approved as the law required and is unconstitutional and void.

Wherefore, plaintiff prays the court to grant a new trial, and to set aside each of the judgments herein rendered on the 22nd day of March, 1948; one of which denied the plaintiff any right of recovery, and the other granted the defendant a judgment for \$5,000.00 for an attorney's fee against the plaintiff, and for such other and further relief as is just and equitable in the premises.

BAILEY E. BELL,
JULIEN A. HURLEY,
Attorneys for Plaintiff."

III.

The Court erred in not instructing the jury to return a verdict for the Plaintiff at the close of all of the evidence as requested by the Plaintiff and denied by the Court.

IV.

The Court erred in sustaining Defendant's objections as follows:

"Q. Mr. Gordon, will you look in there and get the manifests—all of the manifests?

Mr. Taylor: Just a moment. A point of information. Is Mr. Bell referring to the manifests of the "Elaine G"?

Mr. Bell: Both the manifests of the "Elaine G" and the "Bonnie G".

Mr. Taylor: We object to the manifests of the "Bonnie G", as the earnings of that boat are not in controversy here, your Honor.

The Court: Objection sustained.

Mr. Bell: Exception." [39]

V.

That the Court erred in rendering the judgment that it did render on March 2, 1948, denying Plaintiff any recovery and taxing all of the costs of said case against the Plaintiff.

VI.

The Court erred in rendering a judgment in favor of the Defendant and against the Plaintiff for \$5,000.00 attorney's fees without any evidence

whatsoever having been introduced or even offered to base such judgment on, and that said judgment is unauthorized, unjust, excessive, oppressive and beyond the powers of the Court to render, and there is no just reason therefor, and there is no valid statute of the Territory of Alaska and no laws of the United States of America authorizing such judgment.

VII.

The Court erred in sustaining Defendant's objection to competent questions thereby preventing the introduction of competent evidence, all as shown by the court reporter's transcript filed herein and made a part of this assignment of errors as fully as if set out in full.

VIII.

The Court erred in admitting incompetent evidence on the part of the Defendant over the objection of Plaintiff, effecting income tax and failure to pay the same and depreciation matters which brought about a confusion in the mind of the Jury and caused the Jury to render the erroneous judgment that it did render, all as shown by the court reporter's transcript of the record file herein and made a part of this assignment of errors as fully as if set out herein in full.

IX.

The Court erred in refusing to give the Plaintiff's offered instructions as shown in the record.

X.

The Court erred in not instructing the Jury to return a verdict for the Plaintiff for the possession of the boat and barge involved herein at the close of all of the evidence for the reason that the testimony was [40] all *was* to the effect that the "Elaine G" and the barge operated in connection therewith was the property of the Plaintiff and the "Bonnie G" and the barge operated in connection therewith was the property of the Defendant. Both properties were subject to the payment to the Bank of Fairbanks of the chattel mortgage representing the money borrowed to build the "Elaine G", the two large barges and to rebuild the "Bonnie G" and the evidence all shows that when the earnings of the Plaintiff operating the "Elaine G" and his barge, was sufficient to pay the cost of the construction and the cost of operation of the "Elaine G" and the barge operated in connection therewith that said property was his, free and clear of all claims and all of the evidence shows that the earnings of the Plaintiff operating the "Elaine G" and barge was sixteen hundred ninety-seven and twenty-nine one hundredth dollars (\$1697.29) more than the cost of constructing and operating the "Elaine G" and barge and therefore paid the same out in full, and the boat was his and the only question to have been submitted to the Jury was the right of the Plaintiff to recover his damages suffered by the wrongful con-

duct of the Defendant in taking both boats and barges in the year of nineteen hundred and forty-seven (1947) and operating the same without the consent of the Plaintiff who was the real owner of the "Elaine G" and the barge operated in connection therewith.

XI.

The Court erred in not allowing the motion for a new trial when it was so apparent from the record that the verdict was arrived at unlawfully; was based on prejudice and misconduct on the part of certain Jurors; was contrary to law; contrary to the facts; was not supported by any competent evidence, and was against the clear weight of the evidence, and was based upon the incompetent evidence permitted to go before the Jury effecting the income tax and depreciation to take off of the earnings of the boat and barge.

XII.

The Court erred in not taking the case from the Jury and rendering judgment for the Plaintiff on his motion and request at the close of all of the evidence for the reason there was no defense to the Plaintiff's [41] cause of action for the right of possession of his boat and there no defense and no contradictory testimony, and the Plaintiff testified that the use of his boat by the Defendant during the season last past was of the reasonable value of ten thousand dollars (\$10,000.00) and damaged the Plaintiff to that extent and this stands un-

denied either by direct evidence or circumstances and the Court should have rendered judgment for the Plaintiff for the right of possession of his boat and barge and for the uncontradicted and undenied amount of damage so established.

For all of which errors the Plaintiff prays a reversal of the judgment rendered herein and that the United States Circuit Court of Appeals render the judgment in the case that should have been rendered in the Court below and for such other and further relief as the Honorable Circuit Court of Appeals deems just in the premises.

Respectfully submitted,

/s/ WARREN L. HAGER,
Plaintiff.

/s/ JULIAN A. HURLEY,
/s/ BAILEY E. BELL,
Attorneys for Plaintiff.

Service of a copy of the above is hereby acknowledged this 5th day of May, 1948.

/s/ WARREN A. TAYLOR.

[Endorsed]: Filed May 5, 1948. [42]

[Title of District Court and Cause]

PETITION FOR ALLOWANCE OF APPEAL

The above-named Plaintiff, considering himself aggrieved by the judgment of this Court made and

entered herein on the 22nd day of March, 1948, and the order of the Court as set out in the Minutes of the Court and the Assignment of Errors, said judgment being in favor of the Defendant and also the judgment of this Court overruling Plaintiff's motion for a new trial and the final judgment denying Plaintiff any recovery and entering judgment for the Defendant and against the Plaintiff, and for allowing Defendant an attorney's fee, and a judgment for costs.

The Plaintiff having given due notice of appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit Court of the United States setting in San Francisco, California, for all the reasons specified and set forth in the Motion for a New Trial, Assignment of Errors and the Notice of Appeal filed herein does respectfully pray that said appeal may be allowed, and that a transcript of the records, proceedings and papers upon which said judgment was made and entered, be duly authenticated by the Clerk of this Court and sent to the United States Circuit Court of Appeals for the Ninth Circuit of the United States at San Francisco, California, and this said Plaintiff does further pray that said judgment aforementioned be correct, set aside, reversed, a new trial ordered, and a proper judgment entered for the Plaintiff herein, and that the Court fix the amount of appeal bond to be filed herein. [43]

Petitioner further states that he desires to supersede that part of the judgment giving Defendant costs and \$5000.00 attorney's fee and herewith tenders a bond in such amount as the court may require for such purpose and prays that a Supersedeas be allowed as a part of the allowance of said appeal and the amount of the bond fixed so as to operate as a Supersedeas.

Dated at Fairbanks, Alaska, this 30th day of April, 1948.

/s/ JULIEN A. HURLEY and
BAILEY E. BELL,
Attorneys for Plaintiff.

Service of a copy of the above is hereby acknowledged this 5th day of May, 1948.

/s/ WARREN A. TAYLOR,
Attorney for Defendant.

[Endorsed]: Filed May 5, 1948. [44]

[Title of District Court and Cause]

STIPULATION

It is hereby stipulated by and between Warren L. Hager, Plaintiff, and his attorneys of record, Bailey E. Bell and Julien A. Hurley, and Clyde E. Gordon, Defendant, and his attorney of record, Warren A. Taylor, that in printing the record on Appeal in the United States Circuit Court of Appeals for the Ninth Circuit, the title of the Court

and cause shall be printed on the first page of said record and that thereafter it be omitted, and in its place the words, "Title of Court and Cause," may be inserted and that all endorsements on said papers may be omitted except the Clerk's filing, marks and admissions of service.

It is further stipulated that the Court may make an order to the Clerk to send all of the original exhibits and identifications up, as a part of the record and transcript on Appeal instead of copies thereof.

Executed at Fairbanks, Alaska, this 30th day of April, 1948.

WARREN L. HAGER,
Plaintiff,

By BAILEY E. BELL,
Of Attorneys for Plaintiff.

CLYDE E. GORDON,
Defendant,

By WARREN A. TAYLOR,
Attorney for Defendant.

[Endorsed]: Filed May 5, 1948. [45]

[Title of District Court and Cause]

ORDER ALLOWING APPEAL AND FIXING
AMOUNT OF BOND

Now on the 6th day of May, 1948, the same being one of the days of the April, 1948, Term of this

Court, this Cause came on regularly to be heard upon the petition of the Plaintiff herein for the allowance of appeal in behalf of said Plaintiff from the final judgment entered in said cause on the 22nd day of March, 1948, and from the judgment of the Court overruling the motion for a new trial, and also for fixing the amount of appeal bond on said appeal, and the place of hearing said appeal, and said Court being fully advised in the premises.

Does Hereby Find that the amount of appeal bond should be two hundred and fifty dollars (\$250.00).

Does Further Find that the Plaintiff shall be allowed a stay of execution of that part of the judgment giving Defendant costs and five thousand dollars (\$5,000.00) Attorney's fee, pending final determination of this appeal upon his filing in this cause a supersedeas bond in the sum of six thousand dollars (\$6,000.00) which bond is to be approved by the Judge of this Court.

Now Therefore, it is hereby ordered that the appeal of said Plaintiff from the final judgment entered herein on the 22nd day of March, 1948, and the judgment and order of the Court overruling the motion for a new trial, of the motion filed on March 24, and overruled on March 29th, 1948, be and the same is allowed to the United States Circuit Court of Appeals for the Ninth Circuit, and that a certified transcript of the records, proceed-

ings, orders, judgment, testimony, and all other proceedings in said Matter [46] in which said judgment appealed from is based be transferred, duly authenticated, to the United States Circuit Court of Appeals for the Ninth Circuit and therein filed and said cause docketed on or before 90 days from this date to be heard at San Francisco, California, and

It Is Further Ordered that the amount of the appeal bond be, and is hereby fixed at the sum of two hundred and fifty dollars (\$250.00), said bond to be submitted to and approved by the undersigned Judge of this Court.

Done in Fairbanks, Alaska, on the 6th day of May, 1948.

/s/ HARRY E. PRATT,
District Judge.

Service of a copy of the above is hereby acknowledged this 6th day of May, 1948.

/s/ WARREN A. TAYLOR,
Attorney for Defendant.

May 6, 1948.

Entered in Court Journal No. 36, page 253.

[Endorsed] Filed May 6, 1948. [47]

[Title of District Court and Cause]

BILL OF EXCEPTIONS

The Plaintiff respectfully presents the following Bill of Exceptions for allowance and settlement upon the appeal taken from the rulings, orders and judgment of the Court as set forth in this Bill of Exceptions and as set out in the Assignment of Errors and Notice of Appeal filed herein, which will be hereinafter presented in the routine and times of the happenings thereof as near as practicable, the first of which the Plaintiff complains is as follows:

I.

That shortly after the commencement of this trial the Plaintiff called the Defendant to testify and to present the books, records, manifests, receipts, checks and so forth of the operation on the rivers for the freighting season of 1945; and the following proceedings took place: (See page 3 stenographer's transcript.)

“Q. Mr. Gordon, will you look in there and get the manifests—all the manifests?

“Mr. Taylor: Just a moment. A point of information. Is Mr. Bell referring to the manifests of the “Elaine G”?

“Mr. Bell: Both the manifests of the “Elaine G” and the “Bonnie G”.

“Mr. Taylor: We object to the manifests of the “Bonnie G”, as the earnings of that boat are not in controversy here, your Honor

“The Court: Objection sustained.

“Mr. Bell: Exception.

This was an error of the Court which confused the Jury throughout the entire trial and prevented the Plaintiff from making part of his [48] case, that is, to-wit:

He was able to prove the entire earnings of both boats to a definite figure, and then was prevented from proving the earnings of the Defendant with his boat and barge which would have proven unquestionably the earnings of the Plaintiff's boat and barge to have been over \$52,504.75 and the cost of his boat and barge was less than that amount, and by so proving the jury would not have been confused and rendered the unconscionable and unintelligible verdict that they did render.

II.

The Court erred in not instructing the jury at the close of all of the evidence to render a judgment for the Plaintiff for the possession and delivery of the “Elaine G” and the barge operated in connection therewith for the reason that there was no real contradictory evidence introduced on behalf of the Defendant, and all of the evidence on behalf of the Plaintiff established the fact that the boat was the property of the Plaintiff and that the cost of the construction and operation thereof had been fully paid and that the Plaintiff was entitled to the possession thereof at the time this suit was filed, to-wit: May 13, 1947.

All of the material evidence in this case in a narrative form is as follows, to wit:

The first witness called to testify was the Defendant, Clyde E. Gordon. He testified that he lived in Fairbanks, Alaska, was subpoenaed by a subpoena duces tecum to bring all the books and papers of every kind that were used in the equity suit that was dismissed; he testified that he had done so; had brought the manifests of the "Elaine G" and the "Bonnie G", then produced the bills of lading or manifests of both of the boats which were marked for identification; testified that they were the originals and that by using the word bill of lading he meant manifest; he picked out the manifests for the freight handled by the "Elaine G" during the summer of '45 and they were marked Identification Number 1; testified they were the manifests given at the time the boats were loaded, the only ones he had, all signed as originals. (See T. Pp. 6 and 7.) The manifests were then separated, part were marked Identification 2 and were admitted as Exhibit "A". He testified that he had all of the records introduced in the equity case which were left in the custody of the clerk and were later [49] turned back to him, and he took them home and were in the same condition; he is quite positive all of them were there before and that they are all there now; that in receiving the loads at Nenana or Galena they issued a manifest sometimes called bill of lading, and that

is what he identified. Then on cross examination by his attorney, Mr. Taylor, he testified that the bills were changed some before payment, some of the tonnage was changed to cubic tons which made some loads larger and some smaller, but that he received approximately the amount of money as shown on the manifests; then on re-direct, he stated that the records in the box should show the changes but he couldn't find them, but the amount he received was substantially the same as that on the manifests, within a few cents or dollars of it. That he received two checks at the Bank of Fairbanks, one for \$44,297.91 on September 11, 1945, or around that time; another check for \$33,095.52, a total of \$77,393.43 from those two checks; the Alaska Railroad paid an additional \$308.23; and for towing a scow by the "Elaine G" he was paid \$50.00, and \$40.00 a piece for the "Elaine G" and "Bonnie G" for standby time. That the exhibitions included all of the cost of construction and the operation of the "Elaine G", the two scows, and the repair of the "Bonnie G" or rebuilding of the "Bonnie G" and also included the cost of operating of the equipment from the time it left Fairbanks until it was pulled out on the bank, and the exhibitions are all correct as far as he could see. Then Warren L. Hager, the Plaintiff in the case, was called and testified in his own behalf that he was referred to as "Bud" by his friends, had borne that nick name all of his life; he was the

nephew of "Doc" Gordon, the man that had just left the stand; his sister was the mother of the witness. He came to Alaska in compliance with the request of "Doc", met him at Big Delta; came by boat to Valdez, by truck to Big Delta in the spring of '41; found "Doc" Gordon immediately where he was residing at the Reeka Wallen's boarding house; that he was ferrying trucks for the trucking association across the river; that he stayed there; that he went to work for Mr. Gordon as a deck hand, and helped him with ferrying; that he landed in the early part of July, before the fifteenth; came to Fairbanks with "Doc" several weeks later. Discussed the purpose of the trip with "Doc"; the trip was to get some financial support to build a boat. [50] "Doc" wanted a partner to put up some money to build an outfit to freight on the river. He procured the help from E. M. Jones, the operator of the Cottage Bar. The lumber was purchased, the machinery ordered; they went back to Reeka Wallen; they took axes and cleared a piece of brush to lay the keel for the boat; from then on they worked building the boat every day; both worked; also Charlie Smelzer and other carpenters, two or three. Charlie Smelzer was a boat builder. They built the "Bonnie G", operated it on the upper Tana to Tanacross, Tetling and Northway; he worked as a deck hand on the boat, stayed there until the fall of the year, that was 1941. Did the same thing in 1942, joined the army in Decem-

ber, 1942. The boat got frozen in the first year 1941; second year it was pulled out at Big Delta; he was in contact with "Doc" Gordon all the time he was in the army; was stationed here; there was an awful freighting boom on the river; there weren't enough boats to handle all the freight there was to haul. He was interested in that line of business; he thought he would like to get into it. He had an agreement worked out with a fellow whereby they were going to get what money they could and build a boat and put it down on the river for freighting down below. He talked it over with Mr. Gordon in the wintertime, and talked to Gordon several times, in the winter of '44 and the spring of '45 at the Nordale Hotel, N. C. Co., Cottage Bar and wherever they chanced to meet; sometimes ten times a day for a week, then maybe two or three times another week, depending on when he could get to town or how busy Mr. Gordon was; that was the main topic of conversation. He said to "Doc": "I would like to go freighting and I have a deal on with another guy to build a boat. We are in the Army. We may not get to operate it, but there is one man that we think could, and he is working for you, and we would like to have him work for us, if you could spare him, and that boat we are building could operate along with you down there on the Yukon River." (See T. Pp. 22.)

The question was asked: "What did 'Doc' say

to that?" "Doc" thought it was a good idea. He said it was fine, to get this boat business, but he said: "Come in with me. I will take you and we will go to the bank and see [51] if we can get the money, and I will go outside and get machinery and we will build the boat here. You can build it while I am out getting machinery, and then you will be in with me down there." He liked the way I operated—the way I worked. He said: "I think you will be good on it. You will have a boat and a barge, and I will have a boat and a barge, and after this money is all paid—' we was going to make a lot of money; he said, 'I am going to sit back and take it easy and you can take both boats. What money you make with your boat and barge will go into paying it off, and as soon as it is paid off, it becomes yours, free and clear.' " (See T. Pp. 22 and 23.)

He went into details about the boat he wanted to build; they spent several days together in the Northdale Hotel, drawing plans, conferring with Charlie Smelzer, got everybody's ideas together; wanted it as soon as it possibly could be built, whatever size we thought the money could buy lumber enough for; we worked it out together. The boat was built 46 feet long. We agreed on power barges to operate with the boats.

"Now, tell us about the power barge you agreed on?

"We agreed on a boat and a barge for myself,

and he said as long as we were building that, 'I need another barge.' He had a small barge, but he said, 'I need another one. You can build one for me, the same size you are going to have.' That will make two barges and one boat we were to build.

"Did you draw any plans between you, on them? We drew sketches.

"Did you talk to Charlie about those? All the time.

"Now, then how big were the barges that you were going to build? They would be 20 by 110. Twenty feet wide by one hundred ten feet long.

"Were they to have any power in them? They were to be self-propelled.

"Did you agree on the plans of how you were to build them? We did.

"Now, after you did that, what did you do in the way of raising money to construct these boats? We went to the bank.

"What bank did you go to? Bank of Fairbanks.

"Who did you talk to there? Philip Johnson.

"Was he an officer of the bank at the time? He was.

"Now, what was the arrangements made with the bank with reference to financing the building of these boats? [52]

"The arrangements were—(interrupted).

"Mr. Taylor: Just a moment. I object on the grounds—unless it is stated who the arrangements were made with.

“Mr. Bell: I will do that.

“Was ‘Doc’ Gordon present when the arrangements were made? He was.

“Who else was present besides that? Philip Johnson and myself.

“Where was that had, and the arrangements made? At the little private desk of Philip Johnson’s at the bank.

“At that time, it was in the back part of the bank, was it not. That is right.

“Now, then, tell us what the conversation was, and what arrangements were made for financing them? ‘Doc’ outlined all the freighting there was to be done on the river. He had Army verifications. It was common knowledge they had Army Transportation officers here organizing people to build boats, to help the government haul that freight. They needed it. The only way they could get it was by boat. Mr. Gordon made arrangements to mortgage the “Bonnie G” and I believe his little barge that he had then, and a mortgage on the boats and barges that were to be built.

“Now, then, after that arrangement was made, what did ‘Doc’ Gordon do? ‘Doc’ Gordon went Outside. He made arrangements for me to draw on the money to start the building. He ordered the lumber. ‘Doc’ Gordon left for the Outside to get machinery. Machinery was very hard to get then. You had to go after it personally, Outside.

“And ‘Doc’ went out? ‘Doc’ went Outside.

“Do you know about what time of the year it was when he went out? I believe it was in November. The early part of November.

“Now, then, what was done, later, about a place to build the boats? Well, I had to get a place to build the boat, so I tried to lease property along the waterfront. I couldn't. I finally leased that children's playground from the City.

“Who did you negotiate with for the leasing of that playground? Mrs. Sylvia Ringstad was the chairman of the Playground Committee, and she had the say, evidently, of what was to be done to that piece of land. [53]

“Was that lease later reduced to writing? It was.

“It was signed by you? It was.

“Then did you take over the section down there and start your work. I did.

“What did you do about a place to work? I went to the bank and drew nearly \$2,000.00 and went to Morris Knudsen, bought two quonset huts for \$800.00 apiece, bought a Ford pick-up to run around in, hired a cat, moved the quonset hut down on—cleared the snow and debris off and set the quonset up for a winter workshop and started to work.

“What was started inside of that quonset hut? It was the keel; the ribs were prefabricated. We built them all winter long, so they would be all

ready to put together as soon as the snow went off in the spring.

“Did Charlie come there and take part in the operations?

“Charlie was right there all the time.

“Bud, were you transferred from the regular duties at the Army base, to that particular enterprise? I was.

“Now, then, when springtime came, or the weather was so that you could work outside, what did you do? We immediately started putting them together; hired a big crew of carpenters and started assembling all the ribs to make the boats and barges.

“Did you work steadily? I worked in all my spare time.

“You had some duties that you had to give to the Army at that time, didnt you? I did.

“And between the Army and the work down there, about how many hours a day did you work from the time you started, until the boats went in the water? Oh, I averaged about 12 hours a day at least.

“Now, when did you next see ‘Doc’ Gordon, after that?

“When he came back from Outside, in the spring.” (See T. Pp 24/28.)

After they were built they were put in the water, moved below the bridge where “Doc’s” “Bonnie

G'' boat was at the time. It was pulled out of the water by Samson's Hardware, below the bridge.

The "Elaine G" could not go under the bridge with the pilot house on top and that had to be put on below the bridge; it was cut out and put on [54] below the bridge; it was four by eight and a half feet. The barges went under as they were. The "Elaine G" boat was powered by a 165 horsepower Gray-Marine Diesel, two cycle diesel, one engine and one engine in each of the barges. The engine was changed from the "Bonnie G" into his barge, and a new 165 horsepower Gray-Marine Diesel, two cycle diesel engine put in the "Bonnie G" and the "Bonnie G" engine was put in Doc's barge, the same size and kind of power was in each boat, the "Elaine G" and the "Bonnie G".

When they were finished we went down the river freighting. We had a small load to Manley Hot Springs. "We left Sunday afternoon, the 4th of July. "Doc" took off in the lead, down the slough, and I with my boat and barge, I followed him down the river. From there we went right on down to Nenana.

"Now, when you got to Nenana, did you load up with government equipment; government property? Not immediately.

"Now tell us what you did there at Nenana? At Nenana we saw the officer in charge of all the freighting. He said he had one big load to go down the river, but there was very little freight

to go down. It would be all coming back up. He said the next—maybe in—‘what I have got here,’ he said ‘maybe tomorrow you can haul it down the river. I am waiting for word’.” (See T. Pp. 30.)

We had been there better than half a day when he came down and said he had word they wanted the freight immediately. He said “go over and start loading.” He took his boat and barge the “Elaine G” to the loading crane and started loading; the “Bonnie G” was tied alongside, waiting to load.

He testified he had a pretty good load, as much as he wanted to take for the initial trip down the river. He checked out the manifest issued for that load; the War Department Contract Number of the manifest was 7,500-TC-A92. (See T. Pp 31.)

The Gordon Transportation Co. received \$1,885.41 for that load.

When he got to Galena he took on another load coming back.

He further testified that during the recess he and the Court Clerk sorted out the slips, “manifests” in routine as to dates and trips. The first [55] one was dated 7/19/45, that would be July 19, 1945, it was P.X. supplies; the amount of the earnings on that load was \$1,885.41.

The next manifest is dated July 19, 1945 and was shipped from Galena to Nenana and the amount received for the load was \$8,878.50; that

was the trip up the river. He hauled that with his "Elaine G" boat and barge.

The next manifest identified was dated August 1, 1945; the earnings on the trip were \$12,143.70.

He didn't haul any cargo back down the river; unloaded at Nenana and went back for more freight.

The next manifest is dated August 16, 1945. He hauled a load back from Nenana to Galena; it was lumber, and the charges as paid by the government was \$2,400.00. He delivered that load himself, the same as the other loads referred to.

Manifest covering his next trip was dated August 19, 1945, was from Galena to Nenana and the government paid them \$3,198.00 for that load. This load was divided into two manifests. Another manifest issued on the same load was for 430 barrels of asphalt and 308 empty drums for which they received \$6,088.50.

The manifest showing the next load hauled by him was dated September 8, 1945 from Galena to Nenana; it was general cargo and they received for this load \$7,564.80.

The next load hauled by him was from Galena to Nenana, the manifest being dated September 24th, was general cargo and they received \$9,987.61 for the load.

That was all of the manifests showing the earnings of the Plaintiff with his boat and barge insofar as the government was concerned.

He testified further that he was the master of the boat, that he always signed for the cargo as such; that Doc always signed for his boat loads and the Plaintiff always signed for his own; that Doc received manifests for his loads that were there in the box of exhibits.

That he and Doc had an agreement that the cost above the bridge for the construction of the "Elaine G" and the two large power barges would be divided—two-thirds to the Plaintiff and one-third charged against Doc. [56] This was agreed before the boats were finished. That his boat was 64 feet long and each of the power barges were 110 feet long. This agreement was had there on the grounds where the barges and boat were being built. It was awful hard to keep the exact costs separated, and I quote from the witness' words on page 38 of the transcript.

"I said 'Doc', it is going to be awful hard to keep the cost of this barge and your barge and my boat all separated," and we looked at them and looked at the size, and figured the labor, and the material that would go into them, and just as Mr. Gordon, himself, stated, we had to go an estimate that was agreeable to us, and we came to our conclusion that the more delicate work went on the boat would just about compensate for the extra material that went into the barge, and we figured the cost of that operation above the bridge should be divided up, two-thirds of the cost was to be charged to me,

and one-third to be charged to him, as we had three projects under construction at the same time."

That "Doc" Gordon removed his engine from the "Bonnie G" and put it in his power barge, then took one of the three new Gray-Diesels and put it in his boat the "Bonnie G."

He then testified that while work was being done below the bridge it was easy to keep track of the cost; they knew which men were working on which outfit and what material was going into each outfit, and that was easily determined by the paid bills.

It was agreed that the help and the supplies used, including oil and food and everything being a cost to operate the outfits, would be charged *charged* against each boat, and everything used on the "Elaine G" his boat would be paid out of the earnings of that boat, and whoever he hired to work on it would be paid from the earnings. That agreement took effect from the time they passed under the bridge at Fairbanks.

"Doc" rebuilt the pilot house on his boat below the bridge.

The witness put the pilot house on the "Elaine G" below the bridge; a superstructure—a cabin, pilot house was all torn down and rebuilt; the plywood was old, needed replacing. The old engine was taken out, new tail shaft bearings were laid, keel was laid for bearings, the new engine was put in, all housed in; the galley was changed

around; just a general remodeling; [57] a paddle wheel was changed; new equipment all went into the "Bonnie G"; he changed the drive from an automobile rear-end drive to a sprocket drive, the two machineries identical with the exception of a little variation in size of the "Elaine G". The "Bonnie G" was a little shorter than the "Elaine G" but powered equally as high. The "Elaine G" was two feet wider than the "Bonnie G"; they drew about the same amount of water.

The cost of rebuilding the "Bonnie G" was to be charged to "Doc"; the additional work on my boat and barge which was done below the bridge was kept separately and charged to me.

After the equity suit was dismissed, the exhibits were kept for quite a long time in the Court Clerk's office. During that time the witness employed a man by the name of Thomas B. Wright, an experienced bookkeeper to go over all of the exhibits and figure out the cost of the "Elaine G" and the barge, and the earnings derived from the "Elaine G" and barge based upon all of the receipts and bills including the cancelled checks for the cost of building and operating the whole enterprise. He then identified the statement made by the bookkeeper. He worked with Mr. Thomas B. Wright in making out the statement in the Court Clerk's office. He was familiar with the purchasing of all of the material and the using of the labor; that the statements on the yellow sheets are

correct; they show the cost of his equipment separate from the cost of "Doc's" equipment.

Capitulation sheet was prepared by Thomas B. Wright showing all of the figures up to the time that they quit operating that fall; that was marked identification number "4". All of the figures are of Thomas B. Wright and they are correct.

The capitulation shows the cost of each of the barges, each fellow's equipment, the cost of operating the boat and barge and the proceeds derived from the hauling from each boat and barge. The capitulation was made from all of the exhibits furnished by "Doc" Gordon, and all cancelled checks, receipts and bills were put in it. [58]

These exhibits were in Mr. Hall's office at the time. All debts at the bank were paid by government checks. There were two checks from the government, one for \$44,297.91, the other for \$33,095.52. They were turned over to the Bank of Fairbanks to liquidate all indebtedness against the boats. Some part of it was to go to "Doc" Gordon's personal account. They were received for hauling of the two boats. "Doc" received other checks as follows: One for \$308.23; one for \$50.00; one for \$80.00. They were all used by the bank in cleaning up the indebtedness. The \$308.23 was earned with the witness' boat; \$50.00 was earned with his boat, and half of the stand-by time of \$80.00 was earned with his boat. That the two identifications made by Mr. Wright show every

charge and credit in connection with building, maintaining, operating and even beaching of boats and putting them away for the winter. Each item was taken from the exhibit that "Doc" Gordon furnished here, everyone without an exception. The building, operation and beaching of his boat and barge amounted to a little over \$50,000.00, a few cents over. He earned more than \$52,000.00 with his boat and barge that year which all went to the bank to repay the cost. The manifests from the government show that the earnings of the "Elaine G" and barge amounted to \$52,504.75; that he hauled each and every particle of that freight and earned that money, and the government paid therefor. That the earnings of his boat and barge exceeded the cost of the construction, operation, maintenance and beaching of it that fall, to the extent of nearly \$2,000.00. That it cost much more for "Doc" to operate his boat and barge due to the fact that the witness had a crew of three on his boat the whole season, and "Doc" had as high as seven, all paid employees, and each furnished food for their employees; it cost more to feed seven than it did three, and "Doc" got on more sand bars; that the proceeds from the earnings of his boat overpaid the cost of building, construction operation and beaching, nearly \$2,000.00.

When the season was over ways were built down by the C.A.A. tower to pull them out of the water, away from the ice, for the winter. We towed them out of the water. The witness saw to it that his

boat and barge were pulled out, and that "Doc's" boat and barge were pulled out, and allowed half [59] of the cost of pulling them out and charged that into the cost of operation of his boat. They lived on the boat thereafter for some time, then on account of fire insurance, he had to get off. No one was permitted to live on the boats in the winter.

The quonset hut he purchased is still in the possession of "Doc" on the Chena River about seven miles below town.

He never heard any dispute over the ownership of the "Elaine G" and the barge until about two days after he had the boats all pulled out of the water and put away for the winter. This happened when he asked "Doc" Gordon when he could get the bookkeeper to get together and have a settling up and divide the profits, if any there were, and divide the equipment as per the agreement, and "Doc" put him off, said the bookkeeper was so busy, he couldn't get around to it, promised to get around to it in a few days. This was repeated at least fifteen or twenty times right in Fairbanks and when he finally filed suit in equity which was later dismissed.

Next summer Gordon took both of the boats and hauled freight with them; that he knew the reasonable rental value of the "Elaine G" and barge, during the summer season, and that \$100.00 per day was reasonable therefor. That Gordon used it one hundred days until the freeze up in the fall. That the boat was damaged to the extent of \$10,-

000.00. That the wear and tear of a boat depends a great deal on good luck, skill and that the boat always needs an overhauling every fall; a general scraping, painting, recalking, engines looked at, all the routine—but there are occasions when you punch a hole in them, and you have to pull them out of the water and replace planking. It depends a good deal upon what conditions you run into on the wear and tear of the boat.

He never paid anything for the use of the boat. The witness never drew any salary while he was operating the boats on the river; never drew a nickle; he was drawing a sergeant's salary from the army and used that in helping pay expenses, that was \$60.00 per month. Between working on the boat and maintenance of himself, everything he received was spent. [60] He didn't have a thing in the fall, nothing but his boat and barge. He put in twenty-four hours a day right on the outfit from the time he started hauling until the season was over.

On cross examination by Mr. Taylor, he testified that he came to Alaska in July, 1941, worked for his uncle direct quite some time; received pay for his work then; got some compensation. From July, 1941 to October, 1942, he was not fully compensated for his services. "Doc" was operating, as he says, on short money, and if he didn't need his wages it was all right to let them go. When he wanted some money for clothing, or when he went to town "Doc" would give him twenty-five or fifty dollars, what-

ever he needed to cover it. During the winter "Doc" furnished him spending money and some clothes. He enlisted in the army in December, 1942. He went to 'Doc' and wanted the loan of Charlie; he wanted to build some boats. Another fellow and the witness were going to build a boat and wanted Charlie Smelzer to run it on the river. He talked to "Doc" about the proposition. "Doc" was going to finance it, and the witness was going to build it. He and "Doc" made several trips to the bank. It had to be taken up with Cap Lathrop, and they had to go back several times. The result was that the money was raised. The witness signed the notes. The first two were \$3,000.00 each; "Doc" had around \$2,000.00. We agreed on the size we would like to have it before we went to the bank. We wanted the boat to be 64 feet and the barge 110 feet; that he drew \$2,000.00 out of the first \$3,000.00 note, made papers for leasing a piece of land to get ready for the building. He paid \$575.00 for a Ford pickup that Mr. Gordon still has. He bought two quonset huts at \$800.00 each; he sold one for the same money; put it back in the Gordon Transportation Co. account; set up the other quonset hut as a work shop on the City playgrounds; paid nothing for the lease of the grounds, except agree to put it back in as good condition as it was.

Spent all of his spare time working in his shop and Mr. Smelzer was working in the shop full time. They made bits and drills and other things, and he spent his time getting equipment and helping

him in the shop. Smelzer was drawing a salary; the witness was paying him out of the money borrowed from the bank.

Said the waybills amounted to \$52,500 and some dollars. He took the actual cost of construction from the bills. He figured the operating [61] expenses on the river which included putting out in the water of the boat and barges, the taking them out, the food, the diesel oil, the fuel oil, everything that went into the cost of maintaining and operating the equipment. The wages to the bookkeeper were figured in; insurance was figured.

He signed the notes at the bank. The notes were later paid off. The insurance is shown in the sheets. They don't carry insurance when they are operating on the river; no marine insurance; the only insurance would be fire. The rates for other insurance are higher than aircraft rates.

In answer to a question over the objections of counsel for Plaintiff, the witness testified that he did not know about any income tax being paid for the year's operation.

He testified that the life of the boat would depend entirely on who was running it, and who was taking care of it. If he were taking care of it, the boat would be good for twenty years.

Then he testified that his earnings for the summer with his boat and barge alone, was \$52,504.00 and the cost of operation and construction, everything figured in, was around \$50,000.000, testifying from memory.

He has never been given a Bill of Sale for the boat; he has owned it always. There was no Bill of Sale; it was automatically his; he built it; he didn't know whether it was registered or not; it might have been registered in the name of the Gordon Transportation Co.

That he drew no salary for operating the boats; he drew his pay from the army only; the army furnished him his clothes and medical care. He drew for food and quarters. He got his board on his own boat and in restaurants; he might have received a very small check for operating expenses, he doesn't remember exactly.

He had to come to Fairbanks twice for parts; the expense is included in the sheets showing the operating expenses; the cost would be included in that.

Gordon bought a small boat and motor from R. K. Lavery that they would need running around when they came into town, and Gordon said he would [62] give it to the witness to go fishing, or anything like that, provided the witness would take care of it for him and let him have the use of it when he needed it. He doesn't know where that boat is now; they used it in operations on the river.

When one of the boats is loaded and ready it takes off; the season is short.

On redirect examination by Mr. Bell, he testified, Mr. Gordon has the Ford Pickup; Gordon is living in the quonset hut; he doesn't claim either of them; they were both figured in the cost of construction of the "Elaine G" and the two barges;

“Doc” has them and he never tried to get them; yet he figured two-thirds of the cost of them in the construction of his boat and barge.

Then on recross examination by Mr. Taylor he testified that he was to build this boat, operate it, haul freight with it, and when it had handled enough to pay for it, it was just to be his clear; it was considered his boat all the time. The cost of building and operating it was to be paid off by the witness, and it was up to the witness to run it with as little expense as possible so he could get it paid off quickly; that is why he used a small crew and freighted all he could, to get it paid off while the freight was there to haul.

Then Thomas B. Wright was called and examined by Mr. Hurley, testified he had had thirty-five years of bookkeeping experience; he was employed by Mr. Hager to go through the books, exhibits, accounts and manifests of the Gordon Transportation Co. which were in possession of the Clerk of the District Court; that they took each individual invoice from the N.C. Co. and all the business houses that they did business with, and segregated them under their number and date and the proportion of whatever expense went to one account or the other; and we did the same with manifests and checks. There wasn't a thing that wasn't taken into consideration; there wasn't a thing paid out or taken in that was not in the figures, and they were divided against Mr. Hager and Mr. Gordon. Each individual bill was gone through. Bud

went through them first and designated to the witness what they were for and where they were used. [63]

That the cost of building the "Elaine G" and the two big barges above the bridge were divided, one-third to each. One-third was charged to Gordon and two-thirds charged to Hager. They were moved down below the bridge, the engines were picked out for their respective boats, and charged to them, and the other material was proportioned as Bud saw fit that they were used. They were charged against the boat they were used in. Then he handed Plaintiff's Identification "3" and asked what it was. He testified:

"A. This is a segregation that we made out of the different bills charging them to the different segregations, and repairs and equipment and operation and wages.

"Q. Does that include building costs? A. Yes.

"Q. Everything that was there? A. That is right."

The witness prepared it; he didn't check it, since he had prepared it, except to make a recapitulation of the whole thing. "We have income on the recapitulation where we showed the net profit and loss." Identification "3" shows the cost and expenses; it shows the cost of construction of the boats and their operation and expenses connected therewith; based upon the records in the Clerk's office, at the time we made that up. They were all considered, everything item that was there.

Then Identification "3" was introduced and marked Plaintiff's Exhibit "B".

The witness was then shown identification "4". He testified: It was the summary of the expense items, a recapitulation; it shows the receipts and net profit and net loss for the operation of the boats and barges. The receipts are shown from the manifests which are marked Plaintiff's Exhibit "A"—that shows the amounts; the difference in the cost of the building and operation complete, and the earnings of the "Elaine G" is \$1,697.29, taking the receipts and deducting the cost of building and operating.

The statement was then offered and received without objection as Exhibit "C". [64]

On cross examination by Mr. Taylor, he testified: That he was now a partner with Mr. Hager in the Riverside Bar and the Wonder Bar, no other bars. In segregating the expenses Mr. Hager explained each item. The witness didn't know anything about the construction; some of the bills were marked for a particular boat or barge; he didn't remember whether all of them were or not. The figures were taken directly from the bills.

Then there was considerable effort made to ascertain whether or not they took into consideration the depreciation of the boat, but the Court sustained objections, but the effect came before the jury.

He further testified that there was a profit on the operation of the "Elaine G" and above the

cost and operation and expense. There was a profit on the operation of the "Elaine G" of \$1,697.29.

Then he was asked about income tax and over the objection of Mr. Hurley, the Court required him to answer, that he did not figure any income tax.

Then on redirect examination he testified: That he didn't know Hager at all at that time; he had some business dealings with Hager. He met Mr. Gordon to get a sheet of plywood from him. Mr. Gordon said he could have it and Mr. Hager said he couldn't. "I think that is the only time I met Mr. Hager until he came up and asked me to make an accounting." That was when he got acquainted with Hager; he had never been in business with him then; he went in partnership with him later.

W. L. Hager was recalled and on direct examination by Mr. Bell testified: That he was the Plaintiff and the witness that was on the stand in his own behalf. That he had possession of the boat up until the 20th of April, 1946; "Doc" Gordon had had possession of it since; that he was removed from the boat by force; he had lived on the boat all the time until then; that the value of the boat and barge new, should be around \$55,000.00.

On cross examination, he testified: That he was in possession of the boat as his own; he was living on it ever since it was built; didn't [65] have any papers to show ownership; didn't apply for any; was claiming it all the time as his own. He had

(Testimony of Thomas B. Wright)

an agreement with "Doc" that he was to do certain things; that he certainly did do all of those things.

He learned from the contracting officer that gave them the contract to haul the freight that he had earned over \$52,000.00 with his boat. He knew how much freight he had hauled on every trip. He was the owner of the boat; as soon as it was paid for it was his. If it wasn't paid for in '45, he would continue on in '46 to fulfill the contract. He was the owner of the boat all the time.

To his knowledge there never was a certificate of ownership issued to any one. He believed at that time the customs were not enforced by the customs officer with the red tape and things they were to go through in Juneau, and the way the army wanted the freight down there, they didn't require everyone to live up to the specifications.

He then testified that he ordered consideration materials for the boats; that he didn't get the priorities; that the only person getting the priorities was the man that did the contracting. "Doc" did that. That he was the owner of the boat at all times, subject to paying the expenses of contracting and operation. He knew when he hauled his last load. That he had hauled more than \$52,000 worth of freight; that it is marked on the manifest. He hadn't computed the expenses of building and operating up to that time.

He then testified over objection of counsel—no

(Testimony of Thomas B. Wright)

one had computed the income tax in the matter.
(See T. Pp. 86.)

He then testified: that in October, 1945 he was trying to compute the exact expense of operation and the cost of the "Elaine G" and barge with Mr. Gordon and Mr. Gordon kept putting him off. He knew how much freight he had hauled; how much money he had made; he wanted to know the exact cost but Gordon wouldn't bring his books out. He knew generally the cost of the lumber and all of the cost of machinery, and approximately the labor; knew closely what the cost was. He figured all the machinery and lumber. At that time he arrived at an overpayment of about \$10,000.00. And then again, the witness was forced to answer over objections that the income tax was not taken into consideration. [66]

That the current in the Yukon River is very slow; on the Tanana, pretty swift, and a short part of the operations were on the Tanana.

On redirect examination by Mr. Bell, he testified: that the boat and barge were to be his free and clear of all liability; just as soon as he had earned enough money with it to pay off everything that it took to go into the building and operating, up to the time when it had made enough money. That the boat was his from the start but he had to help in the operation with his boat until the earnings from his boat paid the bank the cost of construction and operation; and when that was

(Testimony of Thomas B. Wright)

fully paid the liens were no longer existing against the boat.

He made a half dozen demands on "Doc" Gordon before the suit was filed; to let him have the books audited; he went into the room where the books were kept; he requested an accounting at least ten or fifteen times; he would not give it to him. He never at any time denied the witness' ownership of the boat; never denied the contract between them; he never disputed the witness' title.

Recross examination on recall by Mr. Taylor: he admitted the title in the witness; he always referred to it as your boat at all times, at any time he ever mentioned it.

The Plaintiff rested; the Defendant moved for a dismissal and judgment which was overruled.

Then the Defendant took the stand and testified in his own behalf as follows: That his name was Clyde E. Gordon, and he resided at Fairbanks; had for twelve years; the last five years he had been in the boating business, before that he was in the trucking business. He was the owner of the Gordon Transportation Co.; had no partners; it is not a corporation. He knew Warren Hager; his nephew. That Warren came to him at Big Delta in the year 1941; that Bud worked with him on the ferry. The truckers association had a ferry at Big Delta to haul their trucks across the river there.

Mr. Hager remained in the territory after the work was completed at Big Delta; Mr. Hager

(Testimony of Clyde E. Gordon)

worked and helped him on the boat; the construction of the new river boat the "Bonnie G"; it was built at Big Delta. He drew [67] a salary at the time; he couldn't work a full day; he was injured, but he paid him the same scale as the other men. He worked all of that season to freeze up, then came into town, and the witness rented an apartment and paid for the room rent and the groceries and all the expenses during the winter.

The following summer Mr. Hager worked for him he paid him wages. He was a deck hand on the "Bonnie G"; he went in the army around Christmas 1942, the second winter. He stayed in the army until '45 or '46; stationed at Ladd Field.

He had another boat the "Elaine G"; it was built in the winter of '44 and in the spring of '45 at the playfield here at Fairbanks. He built it himself. Charlie Smelzer was master carpenter. Hager worked on the boat. He helped me; he was to do the running and buying and the pickup and any errands and so forth.

The witness furnished every dollar that went into the boat. We launched the boat the latter half of June. The boats were not then completed. We took them below the bridge and finished the cabin work.

He had an agreement with Bud as to the ownership of the "Elaine G". He had a contract with the United States Government for the trading on the Yukon-Tanana River; did for three or four

(Testimony of Clyde E. Gordon)

years in the name of the Gordon Transportation Company, C. E. Gordon sole owner.

In 1945 he negotiated with John Lathanan, the Commanding Officer at Nenana. The agreement he had with Mr. Hager regarding the "Elaine G" and a certain powered barge or scow was:

"I was to build the boat, get a release from the Army for him to operate the boat; he would operate it until such a time that it had earned enough money to pay for its construction, its operation and all expenses. That was two boats was to be operated together, so as to save equipment and crew; help one another out when we got in trouble; and when that boat had earned enough—sufficient money to pay itself off, clear, I was all clear, then I would give him a title to the boat and he could go into business for himself, or go into partnership with me, any way he could see fit at that time." (See T. Pp. 101.) [68]

The witness further testified: As soon as the boats were built, they started operating, instead of Hager working with him and helping with the boats, he took right off in a big hurry in order to pay the boat off, instead of being a help to me, as he promised, he was a hindrance and worry.

He then identified his signature on Plaintiff's Exhibit "A". He then testified that a certain bill had not been signed, or gone through officially; all the others were signed by him; this one is not signed; not registered; not marked for the boat or anything else, just made out to the Gordon Trans-

(Testimony of Clyde E. Gordon)

portation Co. The goods might have been carried by the "Bonnie G"; he would have had to sign it to collect the money on it. The amount of the bill was \$6,088.50; it is signed by Bud.

After the freighting season, we brought them here and built a ways and pulled them out together, and put them up for the winter. At the end of the airfield, the C.A.A. city property. He immediately moved in town in the Hotel Nordale. He had a bookkeeper; she went there too. Her name was Jean Craig. We went right to work on the books; it took better than two weeks to compile and divide and dissect the cost, as near as we possibly could. There was no record kept of the cost between the two, because it had never been considered in the first agreement, and we had to divide it up the best we could to show Mr. Hager the boats had not earned what he thought they had. That the money received from the United States had not paid off the boat.

He testified: He had borrowed \$12,000 from the bank. There was no way of telling which expense was for which boat; it was all in the company expense. He had to furnish everything for both boats—groceries and supplies, fuel and everything, and there was no way of keeping track of it. There was still something due the bank after the completion of operating year; he couldn't say exactly how much. [69]

He was then handed paper marked Identification "A" that he described as a foreclosure proceedings in the Bank of Fairbanks against C. E.

(Testimony of Clyde E. Gordon)

Gordon, Cecil Wells, Mrs. Wells and Wells Alaska Motors, and the United States of America.

Plaintiff objected to all of this and the Court overruled the objection.

He referred to a note given November 9, 1946 then the Court sustained an objection.

He testified further: that he made arrangements for two \$3,000 notes to be turned over to him at the time it was needed by him in the construction work while he was outside. The money was to be turned over to him.

He then testified he had \$6,000.00. The money was to be used in building the boats.

He testified that he and Jean Craig, his bookkeeper, prepared a statement.

He testified he didn't know the cost of the "Elaine G" and the power scow.

He then testified that he prepared some records with the assistance of Jean Craig, his bookkeeper; that she was now in Japan on government service.

The boats were put away the first part of November; the ice was starting to run. Hager asked for a title to the boat, he and his brother wanted to take the books and go over them. He couldn't let him have them; the bookkeeper was working on them. He made several demands to see the books; figure how much they made, etc.; he couldn't do it. "The bookkeeper and I was working on them as hard as I could to get them done. She was hired out to the government and wanted to leave."

Before he could get them totalled, he filed suit

(Testimony of Clyde E. Gordon)

for the boat. The first part of November; he didn't remember the date.

He knew in his own mind the cost of the construction and operation, and the amount he had taken; there were no figures computed. He thinks the [70] suit was filed November 25th.

On cross examination by Mr. Bell, he testified that the \$77,800.00 and the amount he received from the railroad company and the stand-by time paid the notes at the bank, but he didn't pay any outside credit on account. He testified that he took \$12,000.00 Outside with him. He went Outside just before Christmas, December 23d or 24th, 1945. He had borrowed \$12,000.00 from the bank on a note dated December 15, 1947; he borrowed that in the fall of '45—December 15, 1945. The original mortgage was paid at that time.

“Q. What did you want to say? You said ‘not fully,’ or ‘not altogether.’ What more did you want to say? A. The bank was partly paid off. The original mortgage was paid and the Outside creditors—I had to borrow \$12,000 to cover my expenses, my liabilities.

“Q. Now, you wanted to buy some more machinery, didn't you, ‘Doc’—some more equipment? A. Yes.”

The \$12,000.00 was all paid out by check here. He borrowed \$6,000.00 first in two \$3,000.00 notes; he didn't have a bank account at any other bank than the Bank of Fairbanks; he had somewhere in

(Testimony of Clyde E. Gordon)

the neighborhood of \$2,000 when he first made the deal with the bank and Bud.

Jonesy and the witness had just settled prior to that time, a year before.

The boat, the "Bonnie G" was mortgaged to the bank for a part of its construction; he didn't remember the amount. He had paid Jonesy out of the earnings of '44. He had cleared up the mortgage on the "Bonnie G" at the Bank of Fairbanks before they started building the "Elaine G" and the barges. He couldn't tell how much he borrowed from the bank. He first borrowed \$6,000.00 then the army went to the bank and gave the bank a certified contract for \$60,000.00 to cover the cost of construction and Mr. Johnson advanced me as we needed it.

After the boats were in the water there was a note and mortgage made for \$37,000.00; that was in July. Everything was cleaned up at the time he started this construction. He thinks he borrowed altogether \$40,000.00 to build the boat and the barges and to rebuild the "Bonnie G"; it totalled somewhere around \$40,000.00. He had borrowed from all over and from individuals, in all over \$40,000.00 to build the boats and the [71] scows. He was financed through the bank by the army guarantee of Major Jones. All of that money went into the construction of the "Elaine G" and the two barges. That did not cover the work on the "Bonnie G" but he had already bought the motors when he was Outside before coming in. He bought

(Testimony of Clyde E. Gordon)

a Gray Diesel, 165 horsepower for the "Bonnie G". They were bought in January, 1945. He couldn't say when the motors were paid for.

Phil Johnson drew a draft on the Bank of Fairbanks during that time to pay for them.

He got back in the latter part of May, he believes; April, he thinks; he doesn't remember the exact date; something like that.

He hauled part of load of asphalt up the river; he doesn't remember when. He did have a manifest for it.

He didn't do business with any other bank from the time he started the construction of his boat until he finished in the fall of the year, 1945. All of his business was through the bank of Fairbanks.

He testified that he agreed with Hager that the cost of construction of the boats and barges should be divided, one-third to each of the boats.

The barges were longer than the boats, but the boats had three decks, more material, practically as much lumber and cost in the construction of the boat as there was in each of the barges.

They agreed to separate the cost of construction three ways—one-third to each boat and barge.

Then a group of papers marked Identification number 5, also marked "Bonnie G" manifests of cargo "Bonnie G" and barge were handed to the witness.

He admitted that he did once identify these as containing all the exhibitions, all of the manifests of the "Bonnie G". Then he testified that he

(Testimony of Clyde E. Gordon)

found the bill; he had overlooked it. It is the first page of August 18, 1945 for 310 barrels of asphalt, and that he hauled that up the river, and admitted that was the load of asphalt that he hauled up the river and that the manifest of the "Bonnie G" showed that load. [72] That the manifest that he wasn't sure about that was marked "Bud" was for a large amount of asphalt was dated July 27th. Dated 8/27/45 and is for 430 barrels of asphalt and 350 (see T. Pp. 136) and admitted they were separate manifests and were for different loads.

Then on redirect examination by Mr. Taylor, the witness testified that that particular bill of lading was not an official bill, it had never been signed by him, that there was no money collected on it that he knows of; it couldn't have been collected unless he signed it; it called for \$6,088.50.

He borrowed \$37,000 from the bank and more from some individuals. He said he borrowed \$3,000 at one time and \$2,000 from another party and borrowed several hundred from different parties a little less than \$6,000.

Then, on recross examination, he testified as follows:

"Q. 'Doc', who did you borrow that \$3,000 and \$2,000 from?

"A. That was a personal matter. I would rather not state.

"Q. You don't want to tell us who you got it from? A. The \$1,000 from Cap Lathrop.

(Testimony of Clyde E. Gordon)

“Q. Now, you said awhile ago—did you give a note for that?

“A. No, just a personal loan.

“Q. And when was that? A. I don’t remember the date.

“Q. Well, what year was it? A. ’45, in the spring, during the construction of the boat.

“Q. And why didn’t you put it with—Cap Lathrop owns the Bank of Fairbanks, doesn’t he? A. Yes.

“Q. And you borrowed this other money from the Bank of Fairbanks. Why didn’t you put that in the records of the bank?

“A. That was a personal matter that didn’t go on record.

“Q. How did you pay that money back? A. From the earnings.

“Q. And did you pay it back by check, or how? A. I believe I paid in cash.

“Q. Where were you when you paid him? A. At his office. [73]

“Q. Where? A. In Cap Lathrop’s office.

“Q. Well, in which one? He has a whole lot of them. A. There is only one that I know of, in the Lathrop building.

“Q. It wasn’t in the bank that you paid him back? A. No.

“Q. And you think you gave that in cash—currency? And what size bills? A. I don’t know.

“Mr. Taylor: Just a moment, ‘Doc.’ I think that is a little bit irrelevant and immaterial.

(Testimony of Clyde E. Gordon)

“The Court: Objection overruled.

“Q. Did you understand? Just read the question, please.

(Whereupon, the Court Reporter read the question.)

“A. I answer that. I didn’t remember.

“Q. Do you remember when you gave it back to him? A. Not the date; no.

“Q. Well, approximately the date? A. It was two or three months afterwards.

“Q. Was that after you were running on the river, or before? A. Yes, we were running on the river.

“Q. Who did you get the cash from? A. Cap Lathrop’s Secretary.

“Q. And then you took the money from her and give it to him? Did you. A. You are talking about when I paid it back to him?

“Q. That is right, we are talking about when you paid it back. A. I paid it to Cap Lathrop, himself. As I told you before, this is a personal matter and I didn’t care to go into detail. I borrowed a thousand dollars and paid it back to him, and the books showed it.

“Q. Did you ever mention that to Mr. Hager? A. Yes.

“Q. When? A. He knew what I got the money, and where I got it.

“Q. Didn’t you put that and include that in the \$37,000 note? A. No. There is no record of that on the note.

(Testimony of Clyde E. Gordon)

“Q. When you—you never did give a note for that at all? A. (Witness shook his head.)

“Q. How long did you have that money? A. Two or three months.

“Q. And was there any evidence of it at all in writing? A. The record of the payments. The amount of money that was paid back to him. [74]

“Q. But you paid that in cash? A. (Witness nodded.)

“Q. Did you take a receipt from Cap Lathrop for it? A. No.

“Q. And when you got the cash, his secretary loaned you the cash. A. No, his secretary didn't.

“Q. Well, you said you got it from the secretary. Whose secretary? A. When I borrowed the money, the secretary give me the check, the money from Cap Lathrop.

“Q. Was it cash or check? A. That I don't remember.

“Q. You don't remember whether it was a thousand dollars in cash or a check? A. I believe it was a check.

“Q. And you don't want to tell us who got the rest of that money you testified here about, from; the other \$4,000? A. I don't. I would rather not.

“Q. Did you give any notes for them? A. Yes, I had notes for them.

“Q. Well, don't you have the notes back? A. Yes.

“Q. Where are they? A. I have them in my—put away.

(Testimony of Clyde E. Gordon)

“Q. And you won’t give us the benefit of seeing those notes or knowing who they were paid to? A. They are on record in the books. The money was got, and the money was paid, regardless of who it was given to.

“Q. How did you pay that back, ‘Doc’? A. Out of the earnings of the boat.

“Q. Did you pay it by check or cash? A. I believe it was by check. Don’t you have a check for it? A. Yes.

“Q. Where is that check? A. I don’t know, now. It is a long time ago.

“Q. Well, ‘Doc’, would you show us those notes, or those cancelled checks? A. I said I would prefer not to.

“Q. Did you ever tell Bud anything about those extra dealings any way? A. I had no reason to tell him. It wasn’t any of his business. I was financing the boat. He wasn’t financing it.

“Q. Well, ‘Doc’, you said some debts off Outside in Washington, didn’t you, when you went Outside? A. No.

“Q. What? A. I did not. [75]

“Q. You took some money from here when you went Outside, didn’t you? A. Yes sir, to buy new equipment, and I bought it.

“Q. And that was \$10,000, wasn’t it? A. No.

“Q. How much was it, ‘Doc’? A. I don’t know in total how much it was, because I bought equipment from several different places.

(Testimony of Clyde E. Gordon)

“Q. But you took some bank drafts, didn’t you?
A. Some travelers checks; yes.

“Q. And some bank drafts? About \$10,000?
A. No, \$1,000.

“Q. And that is all you took out to buy all that supplies out there? A. I had \$3,000—\$4,000 note at the bank for that purpose, which I drew from the bank after I made the purchases.

“Q. And that was in ’46 or ’45 that you did that?
A. Early spring of ’45.

“Q. Well, now, you are talking about one time and I am talking about another. ‘Doc’, after you settled with the government in the fall, you went Outside, didn’t you, after the big year on the river, you went to Washington, to your family in Washington, didn’t you? A. I went out, yes. I went out, yes. In the fall of ’45.

“Q. Just before Christmas, I believe you stated?
A. Yes.

“Q. Now then, ‘Doc’, you took some money with you on that occasion, didn’t you? A. Two hundred some odd dollars.

“Q. You took \$10,000 from the Bank of Fairbanks, didn’t you? A. No sir.

“Q. And how long were you out on that trip?
A. Practically three months.

“Q. Three months. Did you write checks against the bank here while you were Outside. A. I did.

“Q. And you bought equipment and repairs and machinery while you were Outside that time, too,

(Testimony of Clyde E. Gordon)

didn't you. A. I did.

“Q. And you had that sent up here to Fairbanks somewhere, didn't you? A. Yes sir.

“Q. And how many thousand dollars worth of that equipment did you buy? A. I don't know off-hand. I never subtracted it—never kept track of it that way. [76]

“Q. Well, it was approximately \$10,000, 'Doc'? A. No.

“Q. Well, was it approximately \$5,000? A. There was \$10,000 worth of equipment that come—followed in '46—B Belt Drive for the paddle wheels.

“Q. Was that \$10,000 worth of equipment? A. That was not money taken from here. That was a mortgage for \$10,000 from the Lomen Equipment Company to cover that equipment. That has not been paid.

“Q. Now, you bought that and shipped it to Fairbanks, did you? A. Yes.

“Q. Did you change the boats over in any way with that? A. I installed that new equipment; yes.

“Q. When did you install that equipment? A. In the spring of '46.

“Q. And, 'Doc', do you have money left from the operations—no, I will withdraw that. Just a minute. (pause) 'Doc', what time in '46 did you change any equipment on the 'Elaine G' boat? A. We changed that year at Ruby, during the month of July, I believe.

(Testimony of Clyde E. Gordon)

“Q. 1946? A. Yes.

“Q. And that was the ‘Elaine G’ that you changed that on? A. It was both boats.

“Q. In July, 1946? A. (witness nodded)

“Q. You are sure of that? A. Yes sir.

“Q. Then you did have the ‘Elaine G’ boat and barge in Ruby on the lower Yukon in 1946, then? A. Yes sir.

“Q. And you had the ‘Bonnie G’ down there at that time? A. Yes sir.

“Q. And you were using them in hauling at that time? A. Yes sir.

“Mr. Bell: I think that is all.

Then on redirect examination by Mr. Taylor he claimed that while he had the “Elaine G” and barge which the Plaintiff claims to own during the year 1946 in July thereof, he bought some equipment and changed the equipment on the “Elaine G” which he contends was worth approximately \$5,000. That was in the summer of 1946 when the Plaintiff claims that the Defendant had wrongfully taken his boat and was using it on the lower Yukon. [77]

Then Ray Kohler was called as a witness, testified that his business was accounting, maintaining an office in Fairbanks by the name of Boulet & Kohler. He had been an accountant for five or six years. He knew Mr. Gordon. He did some work for Mr. Gordon, the first was three years ago, some work to determine the cost of construction and operation of two boats that were to deter-

(Testimony of Ray Kohler)

mine whether or not they had been paid for out of operation. He examined some papers prepared by Mr. Gordon that he referred to in his testimony; it is more of a profit and loss sheet than a balance sheet; it is more of an operating statement. The sheet was offered but objections were sustained to its introduction.

The Court explained to counsel that the data upon which Mr. Kohler made his accounting should be in evidence, and each thing explained, and then he could show how it became his final conclusion. (See T. Pp. 153). This was never done.

He made the sheet up about two years ago, maybe February or March. There are also some work sheets; he doesn't recall the exact procedure at present time; he was able to identify a few items. He used the invoices and cancelled checks; he believes all the cancelled checks were listed; they had been checked off and disbursements are on these sheets, and maybe a little re-apportioning of some of the expenses to these figures. He believes they are a recapitulation of all the items shown to the best of his knowledge. And contained invoices from various debtors, merchants, etc. (See T. Pp. 154.)

He further testified that he checked a substantial portion of the bills and invoices; he didn't believe all the invoices covering the checks were there; they worked merely from the cancelled checks that were issued and cleared through the bank. The checks were drawn on the Gordon

(Testimony of Ray Kohler)

Transportation Co. in payment of the cost of operation of these boats and the cost of building it. He is not so sure but what Mr. Gordon signed a few of the earlier checks.

Mr. Hager was taking care of the construction work; had a certain amount of control over that bank account. He prepared identification "C" with the bills of lading and receipts, and it shows the disbursements, the distribution of the expenses; that was done on the basis of the information he had. [78] Identification "C" was offered and objected to, and the objection was sustained.

He allocated certain construction cost by applying one-third and two-thirds to the "Elaine G" and the "Bonnie G", and one-third to the "Elaine G" and two-thirds to the two scows and the "Bonnie G". He had forgotten about that apportionment until his memory was refreshed; it seems that it was brought out at that time; on the basis of Mr. Gordon's instructions, any way, whatever the apportionment was at the time.

The income tax was based on net income as shown by this statement. The theory that was carried on was that had Mr. Gordon been operating only one boat there would have been income from the "Bonnie G". By operating the two boats he had increased the income that was derived from the operation of the "Elaine G", and the difference of the income tax figured on the income tax on the "Bonnie G", and the combined tax, which amounted to \$23,000.00 made a difference of \$15,-

(Testimony of Ray Kohler)

000.00 additional tax. That is the tax allocated against the operation of the "Elaine G" (see T. Pp. 159). And whether or not that is an equitable apportionment that is something else. The total he computed on the total income. That would be \$22,150.00. The income tax that would have been payable on the "Bonnie G" alone would amount to \$763.00, the difference between \$15,716.00 and a few odd cents. This was all for one year's operation, 1945. The income tax has not been paid.

His figures showed an income from the "Elaine G" of \$39,521.91 instead of the amount shown on the manifest of \$52,455.00. (See T. Pp. 161.)

He testified that he apportioned the earnings of these two boats upon the instructions of Mr. Gordon. Some of the way bills he had never seen until they were introduced in Court here. As he remembered, practically all of the income went to the bank.

Then he testified those way bills were not available to me at the time he made the statement. He then produced some papers that he said were invoices or freight bills. United States Army Transportation Service, addressed to the Gordon Transportation Company. [79]

They were never introduced in evidence and Mr. Kohler was excused as a witness. (See T. Pp. 165 and 166.)

Then Charles A. Smelzer was called. He testified he had lived in Fairbanks for approximately eight or nine years; had been a carpenter most of

(Testimony of Charles A. Smelzer)

the time; knew "Doc" Gordon for about eight years here in Fairbanks and on the boats. His attention was called to 1944. He said he knew "Doc" at the time; worked for him some; he was pilot and engineer on his boat. He was on the boat when it was frozen in up the river. He then went to Seward; came here to Fairbanks. In the fall of 1944 they started work on the "Elaine G" and the two large barges. Mr. Hager paid the first wages, the first month; paid it by check. He doesn't remember the date they started but he worked from then on until the next fourth of July. Then they went off down the river. Mr. Gordon had charge of the work. Hager was there. He gave me orders once in a while how he wanted this fixed or that fixed; that both had the final say, both Gordon and Hager. The boats were launched before the fourth of July.

The witness stayed on the boat, the "Elaine G"; he worked with Hager. Hager was supposed to be the head guy; master of the boat.

The witness stayed on the boat and helped put it up in the fall.

Both Gordon, Hager and himself supervised the putting of the boats away. They were put down by the end of the airfield; he didn't do any work on the boats to speak of after they were put up.

He worked on the boats the following year, on the river, on the "Elaine G". He said Mr. Gordon furnished the money.

On cross examination by Mr. Bell he testified

(Testimony of Charles A. Smelzer)

he didn't know where the money came from. He didn't know how it was raised. He said they were building two barges and a big boat. Both men issued orders to them.

He understood that "Doc" and Bud had some kind of an agreement as to the ownership of the boats; that was what they said themselves. He had heard "Doc" talk about it. He heard "Doc" say in the first place Bud and him had an agreement about building a boat. "Doc" says, "I will build you a boat and give it to you after it is paid for provided you call up with me and help me." (See T. Pp. 172.) [80]

He understood that the "Elaine G" and one barge was to be operated by Bud and the witness; when it was paid for and was clear, it was to be Bud's property provided that everything was carried out.

He testified that he helped build the "Bonnie G". He remembers hauling the asphalt up the river on the "Elaine G" and barge on a trip from Galena up to Nenana.

Everett E. Smith was called by the defense and he testified, that his name was Everett E. Smith; that he was United States Commissioner and Recorder at Fairbanks; has possession of mortgages, bills of sale, and other matters that are for recording or filing. There was a mortgage filed from "Doc" Gordon to the Bank of Fairbanks; he produced it; it is a mortgage for \$12,000, dated Sep-

(Testimony of Everett E. Smith)

tember 15, 1945; it was marked for identification; it has an affidavit of renewal attached to it dated December 15, 1946; it was offered in evidence; the Court sustained an objection to its introduction.

Mr. Smith was excused to be recalled later. The Defendant rested with the reservation to recall Mr. Smith to introduce a certified copy of the mortgage above referred to.

At the time this motion was made out of presents of the Jury,

“Mr. Hurley: If the Court please, at this time the Plaintiff moves the Court for an instructed verdict herein in favor of the Plaintiff and against the Defendant as prayed for in the complaint, for the reason that there has been no evidence on behalf of the Defendant, contradicting the evidence of the Plaintiff as to the contract and as to the money earned, and by the “Elaine G” and the barge, and no evidence contradicting the cost of construction and the cost of operation. The evidence clearly shows that there was \$1600 some odd dollars earned more than the cost, by the Plaintiff, in the operation of the boat, than was expended for the construction of the boat and the barge and the cost of operation.

The Court overruled the motion, and an exception was allowed to Plaintiff. [81]

The Plaintiff, Warren L. Hager was recalled and testified in his own behalf that he is commonly referred to as Bud. He was handed an exhibition

(Testimony of Warren L. Hager)

consisting of manifests that were marked Plaintiff's Exhibit "A" and his attention was called to the manifest whose name written at the bottom is "Bud," and asked to examine it, and to state whether or not he hauled that particular load on the "Elaine G". He answered he did haul that particular load; it consisted of 430 barrels of asphalt, 308 empty drums; he picked up the load at Galena, delivered it to Nenana. He testified that he recognized the hand writing wherever made with a pencil; he recognized the similarity.

He testified further, on those barges we hauled, as Mr. Gordon stated, lots of mixed cargo, and at that time we were getting paid for hauling empty drums back up the river. We were getting a good price for them, and the Army Transportation Service, the officers, would mix up the cargo and sometimes put in two or three of these together and punch them with a clip, showing asphalt, maybe the asphalt would be shipped to Seward, and maybe other things would go to the surplus property. Some would come into Fairbanks. They were made up in duplicate and in triplicate; they would send these out with the load; it was common to have two of these for one load dividing the freight.

The witness further testified that when he and Tommy Wright made up the audit from those tickets in the office of Mr. Hall, the Court Clerk, it was fastened together, exactly as it is now. We didn't write a thing in or put a thing in any way.

(Testimony of Warren L. Hager)

They were pinned together on this desk before they left to go to Mr. Hall's office. He knows that Mr. Gordon testified and picked those out and designated them to be the manifests of the freight hauled by the "Elaine G" and barge.

Then John B. (Dixie) Hall, Court Clerk was called as a witness. He testified that he was the Clerk of the Court; he attended the trial in the matter between Mr. Hager and Mr. Gordon when those exhibits were introduced and they were clipped together by him just like they are now. He never disturbed them in any way; they were sitting in the vault all the time until Warren and Tommy started in on them. They made an audit in the [82] office; he never put anything in there, definitely not. When Mr. Hager and Mr. Hall were there they worked in the little office off the big one. There were only two desks in the outer office and they were in the private office. He didn't stay in there. It could have been inserted without his knowledge; he didn't know whether they did or not. Mr. Hall was excused and left the stand. Recalled and testified he didn't see anything fastened to them in any way, by Tommy Wright or Warren Hager; he knew of no change being made. He was excused.

Thomas B. Wright was recalled in rebuttal testimony for the plaintiff; he testified that he was the same Tommy Wright who had testified before. He further testified that he couldn't remember

(Testimony of Thomas B. Wright)

any of the particular papers but if this paper marked "H" was included in his figured and audit that it was there all the time. He certainly didn't put anything in it or take anything out and didn't change anything in any way.

He was then asked if he was a partner of Hager in the liquor business. He answered, "Certainly I am."

He couldn't remember how they were fastened together or whether or not the clip was taken off at the time. He was then asked on redirect examination by Mr. Bell to add the amount of the manifest. He looked at them and stated he added them yesterday and compared them and they were equal, the same amount as the recap, and this particular one was in the recap when it was added. They checked out exactly to the tab sheets, exactly to a penny.

The next witness called was Mr. Smith the United States Commissioner and the certified copies were produced marked Defendant's Exhibit Number "1" and admitted in evidence.

Both sides rested.

Plaintiff contends that the evidence of the Plaintiff established each and every allegation of his complaint, and that the evidence of the Defendant did not contradict in a substantial way a single allegation in the complaint and therefore the Court should have sustained the motion for an instructed verdict. [83]

THIRD ASSIGNMENT OF ERRORS

The Court further erred in the following proceedings:

“Q. By Mr. Taylor: Now always on this compilation, Mr. Wright, have you figured any income tax on the operating profit of the ‘Elaine G’?”

“Mr. Hurley: We object to that. Incompetent, irrelevant and immaterial. The exhibit speaks for itself. If there was any income tax paid, it is shown in those exhibits—it is in there, according to his evidence, and if they didn’t pay any, it couldn’t be there.”

“The Court: Objection overruled. Exception allowed. A. No, I didn’t.”

This was very prejudicial because whether or not the Plaintiff paid income tax on the earnings from his boat was immaterial, as it made no difference whatsoever to the Defendant. That was a matter between the government and the Plaintiff. The boat was the property of the Plaintiff always, and the Defendant was holding it unlawfully, and this evidence put before the jury, caused the jury to take into consideration, what the income tax would be on the earnings of over \$52,000 by the boat, and of course, by deducting that from the earnings of the boat, the earnings did not equal the cost of production and operation, and this was evidently one of the most colossal errors in the trial of the case, and by a reading of the transcript you will see that this income tax and depreciation of the value of the boat, was constantly asked about by the

defendant's counsel, and was such a grave error as to cause the verdict that was rendered. Because, unquestionably, the agreement was that the Plaintiff was going in with another man and build a boat, and the Defendant "Doc" Gordon urged him not to do it but to go in with him, and that they would borrow the money at the bank, and as soon as the Plaintiff's boat and barge had earned enough to repay the cost of construction and operation, that it was his boat, free and clear of all liabilities. Therefore, income tax was an obligation of the Plaintiff on his own boat, and was not a proper matter for consideration here, at all. Of course, it could be a lien against the boat but that belonged to the United States government until it was paid, and there is no evidence anywhere that it would not have been paid the following year when it became due, if the Plaintiff had received his boat and barge and had not been forcibly held out of possession by the Defendant. [84]

Therefore, injecting two incompetent questions repeatedly into the trial of this case was evidently the reason for the unjust, unintelligible and unreasonable verdict rendered by the jury, when all of the evidence showed that the earnings from the Plaintiff's operating his boat the "Elaine G" and barge, amounted to \$1,697.29 more than the cost of construction and operation of the boat and barge. Therefore, the boat and barge was the property of the Plaintiff, free and clear of all liability or incumbrance to any one, and when the

bank was paid off, and all debts paid against it, there could be no reason why this evidence was competent.

FOURTH ASSIGNMENT OF ERRORS

The Court erred in permitting the Defendant to testify over Plaintiff's objections to money he spent and repairs made on the "Elaine G" in the summer of 1946, when all of the evidence shows he was operating it without the consent and against the will of the Plaintiff, to-wit:

"Q. 'Doc', do you know how much of the money was spent on the 'Elaine G' in 1946?

"Mr. Bell: I object to that for the same reason.

"Mr. Taylor: I asked him if he had knowledge.

"Mr. Bell: In 1946?

"The Court: Objection overruled.

"A. There was close to \$5,000 worth of equipment, besides the labor.

"Mr. Bell: Now, I move to strike that because the contention is here he was wrongfully in possession. We have sued for damages for taking the 'Elaine G' and using it in 1946.

"The Court: Motion overruled. Motion to strike is denied.

"Mr. Bell: And there is no reason for showing that; for showing why he would have to put anything in.

"Mr. Taylor: That is all, 'Doc'."

Mr. Gordon was excused as a witness and left the stand. (See T. Pp. 148.) [85]

FIFTH ASSIGNMENT OF ERROR

Error of the Court in the following proceedings, to-wit:

“The Court: Well, I think it should be shown how he knew how to allocate these sums to the ‘Bonnie G’ and others to the ‘Elaine G’, and also how he computed income tax, and how, in distributing the costs of construction, how—what rule he followed for that, before it is admissible.

“Q. Mr. Kohler, take Plaintiff’s Identification ‘C’. Now, you mentioned that there was a certain allocation of expenses in the construction of the ‘Elaine G’ and the scow. Will you state what that allocation was? A. I believe it was one-third and two-thirds.

“Q. One-third to who? A. One-third to the ‘Elaine G’ and two-thirds to the two scows and the ‘Bonnie B’, but, without refreshing my memory before coming up here, I had forgotten about the apportionment. It seems it was brought out at the time, and it was agreed that was agreeable on that apportionment. On the basis of Mr. Gordon’s instructions, anyway, whatever the apportionment was at the time.

“Q. And would you state how the income tax was carried over?

“Mr. Hurley: We object to the income tax item. No evidence it was ever charged or paid.

“The Court: Objection overruled.

“Mr. Hurley: Save an exception.

“A. The income tax was based on net income as

shown by this statement. I might explain that the reason for this was that—the theory that was carried on was had Mr. Gordon been operating only one boat there would have been income from the ‘Bonnie G’. By operating the two boats, he had increased the income that was derived from the operation of the ‘Elaine G’, and the difference of the income tax figured on the income tax on the ‘Bonnie G’, and the combined tax, which amounted to \$23,000.00 made a difference of \$15,000 additional tax.

“Q. How much? A. \$15,000.

“The Court: That is the tax you allocated to it? A. To the operation of the ‘Elaine G’. [86]

“The Court: To the operation of the ‘Elaine G’? A. Now, whether or not that is an equitable apportionment, that is something else. The total I computed on the total income. That would be \$22,150. The income tax that would have been payable on the ‘Bonnie G’ alone would amount to \$763.00, the difference between \$15,716 and a few odd cents. That, incidentally, has later been substantiated when the Internal Revenue came and . . . (interrupted).

This was prejudicial evidence, and it was incompetent, irrelevant, and immaterial, and Plaintiff contends this was error.

SIXTH ASSIGNMENT OF ERRORS

The Court erred in rendering a judgment in favor of the Defendant and against the Plaintiff

for an attorney's fee of \$5,000 when there was no evidence offered or received, or, before the court, for the purpose of fixing the reasonable value of any attorney's services in connection with the case.

The regular adopted rules for the District Courts for the Territory of Alaska governing us in the trial and appeal of cases so far as the part of the work done, and filed in the Courts here.

Therefore, Rule 35 of the Uniform Rules of the District Court for the Territory of Alaska, effective March 7, 1947, prevail, and Rule 35 and Rule 47 read as follows, to-wit:

Rule 35. Exceptions in Civil Cases.

Whereas the laws of Alaska relative to civil procedure provide:

(a) Section 3636, Compiled Laws of Alaska, 1933: "No exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal or made wholly upon matters in writing and on file in the court." [87]

(b) Section 3637, Compiled Laws of Alaska, 1933: "The verdict of the jury, any order or decision, partially or finally determining the rights of the parties, or any of them, or affecting the pleadings, or granting or refusing a continuance, or granting or refusing a new trial, or admitting or rejecting the evidence, provided objection be made to its admission or rejection at the time of its offer, or made upon ex parte application or in the absence of a party, are deemed excepted to

without the exception being taken or stated, or entered in the journal.”

It shall not be necessary for counsel to take exceptions in such cases, but, if they so wish, they may, in making up a bill of exceptions for the same, show that the exception was duly taken.

Rule 47. End of Term.

(a) The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of this court to do any act or take any proceedings in any civil or criminal action which has been pending.

(b) Any and all undisposed of matters of any nature, pending in this court at the termination of any term, shall be continued over to the next term, and the situation respecting the same shall in no wise be affected by the termination of any term or terms.

Respectfully submitted.

JULIEN A. HURLEY and
BAILEY E. BELL,
Attorneys for Plaintiff.

Service of a copy of the above is hereby acknowledged this 8th day of May 1948.

.....

Attorney for Defendant. [88]

STIPULATION

It is hereby stipulated that the above Bill of Exceptions is correct and may be allowed, and that a regularly certified transcript of the testimony and proceedings had during the trial of the case, duly certified by Margaret M. Montgomery, official court reporter, may be certified and filed by the Clerk of the Court as a part of the record in this case. And that the same may be referred to by either party for the purpose of briefing, and that the same need not be printed as a part of the transcript of record, and that either attorney may refer thereto and quote therefrom in his brief.

JULIEN A. HURLEY and

BAILEY E. BELL

By B.E.B.

Attorneys for Plaintiff.

WARREN A. TAYLOR

Attorney for Defendant. [89]

CERTIFICATE

The within and foregoing Bill of Exceptions, together with the exhibits herein referred to, is hereby settled and allowed, and is approved and certified as a correct record of the evidence adduced at the trial of this cause and a correct statement of such proceedings, pleadings, rulings and exceptions in said cause during the trial and both prior and subsequent thereto as are deemed necessary by the respective parties to present clearly

the matters for review as to which exceptions are reserved, and as are not included in the primary record herein.

It is further certified that such bill was settled and allowed during the judgment-term or proper extensions thereof, and within the time allowed by the Court for the settlement thereof.

Given under my hand this 8th day of May, 1948.

HARRY E. PRATT

District Judge

[Endorsed]: Filed May 8, 1948. [90]

[Title of District Court and Cause]

APPEAL BOND

Know All Men By These Presents, that we, Warren L. Hager, as principal, and Thomas B. Wright and George Gilbertson, as sureties, are held and firmly bond unto the United States of America in the sum of \$250.00, to be paid to the United States of America; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of May, 1948.

Whereas, lately in the District Court of the United States for the Fourth Division of the Territory of Alaska in a suit depending in said Court between Warren L. Hager, as Plaintiff, and Clyde

E. Gordon as Defendant, a judgment was entered against the said Plaintiff herein, granting to the Defendant herein, Clyde E. Gordon, a judgment against the Plaintiff, denying the Plaintiff any recovery and rendering judgment for costs against him, and said Plaintiff having filed in said Court a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit at a session of said Court of Appeals to be holden at San Francisco, in the state of California.

Now the conditions of the above obligation is such that if the said Warren L. Hager, shall prosecute said appeal to effect and to pay all costs that may be taxed against him if for any reason the appeal is [91] dismissed, or if the judgment is affirmed, then and in that event the obligation to be void, otherwise to remain in full force and virtue.

Signed, Sealed and Acknowledged this 8th day of May, 1948.

[Seal] /s/ WARREN L. HAGER,
Principal.

[Seal] /s/ THOMAS B. WRIGHT,

[Seal] /s/ GEORGE GILBERTSON,
Sureties.

United States of America,
Fourth Judicial Division,
Territory of Alaska—ss.

Thomas B. Wright and George Gilbertson, be-

ing duly sworn, each for himself, deposes and says:

That he is a freeholder in said District, and is worth the sum of \$500.00, exclusive of property exempt from execution, and over and above all debts and liabilities.

/s/ THOMAS B. WRIGHT

/s/ GEORGE GILBERTSON

Subscribed and sworn to before me this 8th day of May, 1948.

[Seal] /s/ BAILEY E. BELL,

Notary Public in and for the Territory of Alaska.

My commission expires: 1/28/49.

Approved this 10th day of May, 1948.

/s/ HARRY E. PRATT,

District Judge.

[Endorsed]: Filed May 10, 1948. [92]

[Title of District Court and Cause]

SUPERSEDEAS BOND

Know All Men By These Presents, that we, Warren L. Hager, as principal, and Thomas B. Wright and George Gilbertson, as sureties, are held and firmly bound unto the United States of Amer-

ica in the sum of six thousand dollars (\$6,000.00) to be paid to the United States of America; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals this 8th day of May, 1948.

Whereas, lately in the District Court of the United States for the Fourth Division of the Territory of Alaska in a suit depending in said Court between Warren L. Hager, as Plaintiff, and Clyde E. Gordon, as Defendant, a judgment was entered against the said Plaintiff herein, granting to the Defendant herewith, Clyde E. Gordon, a judgment against the Plaintiff for costs and an attorney's fee in the sum of five thousand dollars (\$5,000.00) and denying Plaintiff any recovery. Plaintiff having filed in said Court a Notice of Appeal, and petition praying an appeal, and an order of the Court permitting the filing of a Supersedeas Bond for the purpose of superseding that purpose of judgment which granted to the Defendant his costs and five thousand dollars (\$5,000.00) attorney's fee, and the Court having made an order allowing said appeal, and allowing the Plaintiff to supersede that part of said judgment and fixing the amount of Supersedeas Bond in the sum of six thousand dollars (\$6,000.00) for the purpose of [93] staying an execution on said judgment during the pending of the appeal in the United States Circuit Court

of Appeals for the Ninth Circuit at San Francisco, California.

Now the conditions of the above obligation are such that if the said Warren L. Hager shall prosecute such appeal to effect and pay all costs that may be taxed against him in favor of the Defendant, and to pay the judgment for attorney's fee, if the same is affirmed by said appellate court, or dismissed, then and in that event, the obligation to be void, otherwise to remain in full force and virtue.

Signed, Sealed and Acknowledged this 8th day of May, 1948.

[Seal] /s/ WARREN L. HAGER,
Principal.

[Seal] /s/ THOMAS B. WRIGHT,

[Seal] /s/ GEORGE GILBERTSON,
Sureties.

United States of America,
Fourth Judicial Division,
Territory of Alaska—ss.

Thomas B. Wright and George Gilbertson, being duly sworn and each for himself, deposes and says:

That he is a freeholder in said District, and is worth a sum in excess of six thousand dollars (\$6,000.00), exclusive of property exempt from ex-

ecution, and over and above all of his debts and liabilities.

/s/ THOMAS B. WRIGHT

/s/ GEORGE GILBERTSON

Subscribed and sworn to before me this 8th day of May, 1948.

[Seal] /s/ BAILEY E. BELL,

Notary Public in and for the Territory of Alaska.

My Commission expires: 1/28/49.

The sufficiency of sureties and the bond are O.K. satisfactory.

/s/ WARREN A. TAYLOR,

Attorney for Defendant.

Approved this 10th day of May, 1948.

/s/ HARRY E. PRATT,

District Judge.

[Endorsed]: Filed May 10, 1948. [94]

[Title of District Court and Cause]

CITATION

The President of the United States of America, to
Clyde E. Gordon, Defendant and Appellee, and
Warren A. Taylor, his Attorney of record,
Greetings:

You are Hereby Cited to be and appear in the
United States Circuit Court of Appeals for the
Ninth Circuit, to be holden in the City of San
Francisco, State of California, within forty (40)
days from the date of this Citation, pursuant to an

order allowing an appeal, made and entered in the above-entitled action in which Warren L. Hager is plaintiff and appellant, and the said Clyde E. Gordon is the appellee, to show cause, if any there be, why the judgment rendered in this cause on the 22nd day of March, 1948, and all orders made in said Court in favor of you, the said defendant above named, and against the plaintiff, Warren L. Hager, should not be corrected, set aside, and reversed, and a judgment rendered in favor of the plaintiff, and why speedy justice should not be done to plaintiff and appellant, and defendant and appellee as above named.

Witness the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States of America, and the Honorable Harry E. Pratt, District Judge of this Court.

Attest my hand and the seal of the above-named District Court for the Territory of Alaska, Fourth Judicial Division, on this 10th day of May, 1948.
[Seal] /s/ HARRY E. PRATT,

District Judge.

Service of a copy of the above is hereby acknowledged this 8th day of May, 1948.

/s/ WARREN A. TAYLOR

May 1, 1948.

Entered in Court Journal No. 36, Page 268.

[Title of District Court and Cause]

MARSHAL'S RETURN ON CITATION

I, Stanley J. Nichols, United States Marshal for

the Territory of Alaska, Fourth Judicial Division, do hereby certify and return that I received the hereto attached original Citation in the above entitled action on the 10th day of May, 1948, at Fairbanks, Alaska; and that thereafter on the 11th day of May, 1948, at Fairbanks, Alaska, I duly served the said writ by delivering a copy thereof to Clyde E. Gordon, personally.

Dated at Fairbanks, Alaska, this 11th day of May, 1948.

STANLEY J. NICHOLS,
United States Marshal.

By Clinton B. Stewart,
Deputy.

Marshal's Fees \$3.00.

[Endorsed]: Filed May 11, 1948. [96]

[Title of District Court and Cause]

STIPULATION

It is hereby stipulated by and between the Plaintiff, Warren L. Hager, acting by and through his attorneys, Julien A. Hurley and Bailey E. Bell, and the Defendant, Clyde E. Gordon, acting by and through his attorney, Warren A. Taylor: That in making up the transcript for filing in the Circuit Court of Appeals in this case that the Clerk may attach the original exhibits instead of making

copies thereof, as this would be better for all parties concerned.

WARREN L. HAGER

By /s/ JULIAN A. HURLEY and
BAILEY E. BELL,
Attorneys for Plaintiff.

CLYDE E. GORDON

By /s/ WARREN A. TAYLOR,
Attorney for Defendant.

[Endorsed]: Filed May 8, 1948. [292]

[Title of District Court and Cause]

PRAECIPE FOR TRANSCRIPT OF RECORD

To John B. Hall, Clerk of the above-entitled Court:

You will please prepare transcript of record in the above entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, setting in San Francisco, California, heretofore perfected to said Court and include therein the following papers and records to-wit:

1. Second Amended Complaint.
2. Answer.
3. Reply.
4. Instructions, including Verdicts.
5. Motions for a new trial.

6. Order overruling motion for a new trial.
7. Judgment.
8. First Notice of Appeal, filed March 2, 1948.
9. Motion for a new trial, filed March 24, 1948.
10. Order denying Second Motion for a new trial, filed March 29, 1948.
11. Notice of Appeal, filed April 9, 1948.
12. Assignment of Errors showing Service.
13. Petition for Allowance of Appeal.
14. Stipulation for printing.
15. Order allowing Appeal and Fixing Bond.
16. Bill of Exceptions.
17. Appeal Bond.
18. Supersedeas Bond.
19. Citation on Appeal showing Service.
20. The transcript of the proceedings prepared and certified by Miss Margaret Montgomery, Court Reporter.
21. Stipulation concerning original exhibits.
22. All of the Original Exhibits.
23. Praecipe for Transcript of Record.

This transcript to be prepared as required by the law and the rules and orders of this Court, and of the Circuit Court of Appeals, for the Ninth Circuit Court, and the record is to be forwarded to the Clerk of said Ninth Circuit Court of Appeals of the United States at San Francisco, California, so that it will be docketed therein within the time al-

lowed for filing the same there as shown by the order of the Court allowing appeal and fixing the bond.

Dated at Fairbanks, Alaska, on this 8th day of May, 1948.

/s/ JULIEN A. HURLEY,

/s/ BAILEY E. BELL,

Attorneys for Plaintiff.

Service of a copy of the above is hereby acknowledged this 8th day of May, 1948.

/s/ WARREN A. TAYLOR,

Attorney for Defendant.

[Endorsed]: Filed May 10, 1948. [294]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the District Court for the Fourth Judicial Division, Territory of Alaska, do hereby certify that the foregoing, consisting of 294 pages, constitutes a full, true, and correct transcript of the record on appeal in cause No. 5628, entitled, Warren L. Hager, Plaintiff, versus Clyde E. Gordon, Defendant, and was made pursuant to and in accordance with the Praeceptum of

the Plaintiff and Appellant filed in this action, and is the return thereof in accordance therewith, and

I do further certify that the Index thereof consisting of Page "a" is a correct Index of said Transcript of Record, and that the list of attorneys as shown on Page "b" is a correct list of the attorneys of record; also that the cost of preparing said transcript and this Certificate, amounting to \$34.25, has been paid to me by the appellant in this action.

In Witness Whereof I have hereunto set my hand and affixed the seal of this Court this 14th day of May, 1948.

[Seal] /s/ JOHN B. HALL,

Clerk of the District Court.

[Endorsed]: No. 11934. United States Circuit Court of Appeals for the Ninth Circuit. Warren H. Hager, Appellant, vs. Clyde E. Gordon, Appellee. Transcript of Record. Upon Appeal from the District Court for the Territory of Alaska, Fourth Division.

Filed May 20, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

